A

HISTORICAL TREATISE

ON

TRIAL BY JURY,

WAGER OF LAW,

AND

OTHER CO-ORDINATE FORENSIC INSTITUTIONS,

FORMERLY IN USE

IN SCANDINAVIA AND IN ICELAND.

BY

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MDCCCXXXII.

DECANO

ATQUE

COLLEGIO JURIS CONSULTORUM CALEDONIÆ

THORL. GUDM. REPP, S. P. D.

Si Valetis bene est. Gravibus qui in causis cotidie versamini, æquum est vestraque dignum magnanimitate ut levis causæ quandoque patrocinium suscipiatis. Aspicite, quantula illa est, quam afferimus, quamque vestram attentionem atque favorem haud omnino volumus videri immeritam. Quæ minus recte sunt posita, ea, quibus inest obscuritas, ordove pravus, vel alia cujuscunque generis negligentia haud vestram aciem effugient—hæc omnia, quæso, corrigite, et de vestra eruditione auctori tantum largimini, quantum ad ejus rectum sensum excogitandum, inveniendum, illustrandum, confirmandum atque stabiliendum opus fore deprehenderitis. Speramus namque vel in illis locis, ubi artis defectus inprimis conspicuus est, doctos equidem, quid sub complicato ineptoque involucro verborum atque sententiarum recti verique lateat, sitque quærendum, posse comminisci: duæ siquidem res nobis in hoc opusculo componendo imprimis molestæ fuerunt atque negotia facessivere: una, imperitia sermonis Anglici; altera, terminoram, ut vocant, technicorum, quibus utuntur Jurisperiti, ignorantia. Jurisprudentiæ, præter Jus patriæ, (Islandicum Jus dico), nunquam operam dedimus, et siqua Anglici juris cognitio ad hunc tractatum conscribendum requirebatur, illa pro subitaria necessitate fuit quærenda. Nostro nequaquam animo, sed monitu et consiliis amicorum, morem gessimus, ea in re, quod Anglico potius quam Latino sermone usi sumus. Cum in Eruditorum gratiam imprimis disputata sint, quæ hic disputantur, usus docti sermonis haud veniam tantum erat habiturus, sed et commendationem, nosque forte comprobatorum ampliorem numerum, quam judicum, quorum vehementer essemus sententiam reformidaturi; nec Islandum communi Eruditorum lingua loqui ulla res vetuit, sed Islando Anglice loqui magis erat formidolosum. Latinus denique sermo est præ ceteris plerisque aptus ad accurate, dilucide, lepide concinne, quamcunque rem tractandam. Ab altera autem parte multi memet Lecturis gratam rem facturum dictitabant, si, " pe-
" regrinus cum essem, vernaculi sermonis Anglici scribendi facerem
" periculum; neminem gravem futurum alienigenæ, siquando ti-
" tubaret, exagitatorem, multos vero lubentissime mihi viam mon-
" straturos atque indicaturos, quicquid mutandum esset atque corri-
" gendum." Quorum verbis me haud cunctanter passus sum persuaderi, præsertim cum Anglici sermonis semper fuerim adeo ar-

dens amator ut in ea animi propensione vix ab indigena quidem vincar; cujus rei haud levia documenta sunt ea, quæ pertuli atque exantlavi propter solam jucunditatem Anglice audiendi atque loquendi; placuit et illi clarissimo Seni, quo monente scribere occepi ut Anglice scriberem.

Per lustrum atque annum et quod excurrit in vestra bibliotheca numeri functus sum: per id totum tempus Vestram sum expertus humanitatem, urbanitatem, indulgentiam. Quorundam inter Vos mihi licet amicitia gloriari, favore et benevolentia omnium. Nos certe voluimus atque studuimus in munere nobis concredito, nos ita gerere, ut æquis, justis, bonis omnibus placeremur—ut quanto quis cæteros magis antecelleret humanitate atque benignitate, tanto magis strenue, ejus gratiam ambiremus. Grati semper ejus rei recordabimur, quod vos sinceram voluntatem haud estis aspernati,—quod illam vel in tenui conatu discrevistis—quod equi quantulumcunque ardorem et obstantiam sufflaminis, cum justitia pensavistis.

In hoc loco æquum est, debitumque, honoris caussa nominare Clarissimos Jurisconsultos, qui mihi in erroribus et negligentiis ad sermonem pertinentibus emendandis opem tulere: Dico VV. Cl. Cl. Guilielmum Dawney, Georgium Moir, Hamiltonum Pyper, et forte alios quosdam. Hos sæpe consului, sæpe illis negotia perhibui, et semper eosdem deprehendi ad respondendum paratissimos; et si ego forte modum omnem et moderationem excessi in rogitando illorum semper comperi urbanitatem atque humanitatem indefessam. Vos autem VV. Cl. Cl. nostis, perspectamque habetis horum Virorum insignem liberalitatem, nostraque minime egentem laude. Quæ tamen, vel nunc, deprehendentur contra proprietatem sermonis Anglici peccata, nostræ omnino incuriæ sunt tribuenda; nam cum nos importunitatis sat porro processisse comperiremus, ad omnia Virorum Clarissimorum nobisque amicissimorum attentionem solicitari, religio fuit. A V. Cl. Frederico Stoddart sum consecutus egregia duo opuscula Patris Johannis Stoddart Equitis de Juratorum Judicio in Melite Insula instituendo. In his sane est magna eruditio et egregia ratiocinatio in parvum congesta locum, unde multa desumpserim ni tum meum ad finem perductum fuisset opusculum quando Stoddartis inspicere contigit. Idem valet de manuscripto opusculo viri Consultissimi Johannis Murray pereleganti, Lingua Latina conscripto, quod nobis legendum præbuit: verum quæ hac vice haud licuit nostro usui accommodare forte magis opportuno tempore licebit consulere.

Ne vos pluribus morer, VV. Cl. Cl. Consultissimi, Valete, nobisque favere pergite.

Scripsimus Edinburgi ad Beatissimi Cuthberti
die vii a. Idus Mart. A° Post Red. Orbis MDCCCXXXII.

VIRO PERILLUSTRI

ROBERTO LISTON EQUITI

REGI MAG. BRIT. QUI ET HIB. DOM. A CONS. SANCTIOR.

THORL. GUDM. REPP, S. P. D.

Si vales bene est, valeo. Quem ad modum in hujus universi fabrica supremus æternusque mundi artifex, in immensa vastitate multitudineque rerum, et varietate infinita, UNITATEM constituit (Λόγον vocarent Platonici) velut vinculum et compagem solvi nesciam : ita mortalium opera et cogitationes tum rectissimæ censentur atque præstantissimæ, quando et in illis unitatis quoddam vinculum conspicitur, et divini πρωτότυπα, ut ita dicam, ambitiosum exemplar. Hac unitate dempta philisophia nulla est, sine hac, ne poesis quidem ulla, absque eadem divinarum nulla rerum scientia, nulla legum, nulla naturæ, nulla morbi atque sanitatis. Hæc eadem imprimis est conspicua in eorum operibus hominum, tam pristinæ quam nostræ ætatis, qui maxime dictis factisve claruere. Hanc in Homero animadvertit Stagirites ; hanc in Stagirite quis non deprehendit ? hanc in divinis vatibus Ariosto et Shakespeare, vel contranitente turba perverse judicantium, facile est indicare. In arte quacunque atque scientia anima pulchritudinis et venustatis est *unitas;* hæc eadem in omnibus ipsa veritas est : nam ubicunque illa desideratur fas est de hac dubitare. Quicunque illam sectamur in cogitando, agendo, contemplando, scimus nos rectam ingressos viam sapientiæ, rectaque ad omnis cognitionis fontem, Deum, tendere.

Unitatis hocce studium in nostræ ætatis hominum scriptis quærimus. Velut in polypo, diffusa in scientiis viget anima. *Facta*, ut ajunt, quærunt : Veritatis obliviscuntur. Historiam quam Deus O. M. vastam quandam Iliada constituit, volunt esse meram rerum gestarum recordationem, seriemque Factorum. In naturali Historia quoque sola jam *facta* quærunt Baconis, Herveyi Linnæique posteri, tenuiculum sapientes. Metalla, alcalia, acida nova, novosque sales quærunt chemici, qui prius per *ignem* philo-

sophabantur, ab eo suæ artis sumentes principium, ad eum cuncta rectissime referentes. Siderum calculum inimus imo solis fere radiorum, quanto satius esset ab ipso Newtono bene discere motus quid principium sit, ab Oerstedo quid luminis.

Verum in scientiis valet illud Aristophanis.
Δῖνος βασιλεύει τον Δί' ἐξεληλακώς.

Tria sunt Historiæ momenta gravissima: Sermo, Religio, Leges: vinculum quod hæc incercedit, in unumque jungit, a philosopho percipitur. Is qui horum primordia recte perspexit, is rectum invenit initium historiæ, is demonstravit historiæ et psychologiæ junctionem, is ad naturalem forte theologiam plus contulit quam omnes omnis anteactæ ætatis sapientes, is denique historiæ fundamenta in adamantina quadam rupe collocavit; tantæ autem rerum vastitati, tantæ amplitudini investigandi, quæ mens, cujusve ingenium hominis sufficiet. Recte igitur hanc rem adgredi illi videntur, qui sermonis historiam seorsim indagant, aliis religiones linquentes, aliis leges: in primo genere Erasmus Rask haud clarus tantum, sed singularis, etiam tempore fere primus; in secundo Magnuson foelix et indefessus; in tertio vix unum novi, qui ullam ullius momenti rem sit periclitatus.

Cæterum et tum quamcunque historiæ partem vel minutissimam recte tractari arbitramur, quando pars, licet separata, ad suum totum, suumque corpus, velut membrum refertur. Recte de Anglosaxonum, eorumque progeniei, Anglorum, legibus disputabit, qui istas Borealium legum partem esse recordabitur, recte is, qui Teutonicas quascunque leges, Saxonicas, Frisicas Longobardicas a Boreali repetit origine: (sermonis enim atque legum videtur apud istas gentes non nihil differre ratio); recte is denique, qui reputabit, eas gentes, quæ sermonibus utuntur ab eodem fonte derivatis (uti Indicæ, Slavicæ, Thraces, Gothicæ, demonstrante Raskio), easque, quæ simili systemate religionum (uti eædem Magnusonio auctore) in legibus quoque, specie quidem variis, principii unitatem servasse; quanquam procreandi typus nonnunquam sit diversus inter leges, religiones et linguam: haud enim semper eadem gens ab eadem petit legis et sermonis proximam originem v. c. Anglorum est lingua Teutonica sed leges sunt Boreales. Attamen uti nil vetat arteriarum venarumque seorsim tradere physiologiam, sic nil, separatam quandam historiæ partem persequi, vel mores spectantem, vel leges, vel cultum Deorum.

Sic cum de Historia et universo studio scientiarum sentiam, statueram et ego in Historia Judicii Juratorum investiganda, eam, quam jam paucis explicavi, normam sequi, et cum Borealium Legum omnium, quantum ad hanc rem attinet, analogiam et harmoniam ex ipsis Juris Codicibus demonstrassem, doctorum virorum premere vestigia, Juratisque Judicibus ex omni regione, Europæ,

Asiæ et Africæ, ubi deprehenderentur, diem dicere: Speciminis loco Commentationem, quam de *Judicibus Juratis Atheniensium* ad Virum Illustrem scripseramus, decrevimus, ni otium defuisset, huic adjungere Tractatui ut harum rerum periti vel curiosi, uno velut obtuitu, possent eam, quæ Græcorum atque Gothorum rem forensem intercedit similitudinem contemplari; sed mutato postea consilio, eo proposito impræsentiarum supersedere satius visum est. Verum tamen in multis, et in gravibus quidem rebus, similitudo manifesta: Juratis et Boreales et Athenienses Judicibus utebantur; utrique, haud Jurisperitos tantum, sed cives ingenuos in Juratorum numero esse voluerunt: magistratus fecerunt Præsides tantum judiciorum, solam Ἡγεμονίαν causarum illis concedentes; utrique legum ferendarum munus atque judicandi in unum confundebant; utrique sub dio judicabant (Saltem in Areopago Atheniensium Senatus, qui quantum ad rem judicialem attinet eorum fuit *House of Lords*—semper vero et ubique Boreales); Duodenarium numerum Judicibus proprium utrique duxisse videntur: Boreales enim judices elegerunt numero duodecim, viginti quatuor, triginta sex, quadraginta octo, et sic porro: sed Athenienses quotannis sorte eligebant Judicum millenas semidodecades sive D dodecades, et in quamvis Decuriam Judicum, viros DC *i. e.* L dodecades nuncapabant, quanquam horum modo DI ad judicandum vocavere; utrique demum in sententiis ferendis PLURIMA SUFFRAGIA rata habuere. Cæterum Athenienses cum in multis aliis institutis, tum in Judicum numero, tantum excedebant Boreales, partim propter copiam civium, partim quia eorum omnia instituta magis fuere popularia. Duodenarius Judicum numerus etiam Ægyptis placuit teste Diodoro (Hist. l. i. cap. 92.), nam cum quadraginta duo Judices de mortuis sententiam ferrent, vix dubitare possumus quin huic numero subsint dodecades tres atque dimidia: præsertim cum idem auctor memoret viventium triginta Judices, qui numerus additam dimidiam dodecadem binis integris complet; mortui nempe viventes in Judicio una dodecade superabant.

Cæterum, Vir Clarissime, multa licet in hoc nostro Tractatu dediderentur; illa, quæ a Te quærebantur ibidem credo deprehendes satis accurate disputata. E sat magno numero Codicum demonstravimus *Juratos Judices Plurimis suffragiis lites derimere consevisse*, reosque condemnare vel absolvere: quam potuimus strictissime distinximus *Evocatos* (Thingmenn) a *Juratis*, utrosque a *Veridicis*, omnes a *Conjuratoribus*, et a se invicem. Talem, ab Anglo quidem scriptore vix antea factam distinctionem, perutilem duximus, atque necessariam, ad rem forensem gentium Borealium recte intelligendam atque dijudicandam. Caussas indicavimus quibus labefacta sit forensis auctoritas *Juratorum*; quidque hocce institutum habuerit peculiare (characteristicum recentiores vocant) in Norvagia, Svecia, Dania, Islandia. Unanimitatem sententiarum in *Judicio Juratorum* PURO atque simplici ne cogitabi-

lem quidem esse, historica ratione, credo, satis superque demonstratum est: mixtum esse Britannorum institutum (the British Jury), e Juratis et Conjuratoribus, argumentis probabilibus adducti sumus ut crederemus. Saxonicarum legum originem sedulo investigavimus, et eruditorum omnium, qui ante nos hac de re scripsere, sententiis examinatis missisque, novam ingressi viam, ni multum fallimur, primi, hasce Leges ad earum verum legitimumque fontem sumus persecuti; quæ nostra deductio si Tibi et viris eruditis est placitura, ad doctorum convivium nos sportulam contulisse gloriabimur; hæc enim de Saxonum legibus quæstio, hactenus opaca nocte fuit involuta.

Typographus quanquam nostrum opusculum excudit diligentissimus et omni nomine commendandus, non nullæ certe mendæ nos latuere, corrigentes; sed has plerasque, vel nostræ negligentiæ vel negotiis curisque alienis, haud typographo, justum est ascribere. Multis uti cogebar verbis peregrenis, terminisque technicis; multa citare loca auctorum variis linguis scriptitantium,—ἀλλοδρόων ἀνθρωπῶν,— quæ omnia Typographus, quatenus per typorum copiam licuit, mira cura fideque est exsecutus. Graviores plerasque mendas in limine notavi: annum quo gestum est proelium Hafursfiordense nequanquam recte posui; nam DCCCL^{um} cum ponerem debui DCCCLXXXV^{um} scribere. Tu vero, Senex Clarissime, nostræque Nestor ætatis, cura ut valeas nobisque fave.

Scripsi festinans ad Beatissimi Cuthberti die vii a. Idus Mart.
A° post Red. Orbis MDCCCXXXII.

A LIST

OF

SOME OF THE WORKS WHICH HAVE BEEN CONSULTED, AND ARE REFERRED TO IN THIS

TREATISE.

I.—CODES OF LAW.

(a) Icelandic Codes.

1. Hin forna lögbók Islendínga sesn nefnist Grágás: Codex Juris Islandorum Antiquissimus qui nominatur *Gragas* e duobus MSS. pergamenis (quæ sola super sunt) Bibliothecæ Regiæ et Legati Arnæ Magnæani, nunc primum editus: Præmissa Commentatione Historica et Critica de hujus Juris origine et Indole, pp. ab J. F. G. Schlegel conscripta Havniæ 1829, ii. tom. (1084 pp.) 4to.
2. Járnsída (a MS.)
   The Advocates' Library possesses two MS. copies of this code, which never was edited; both are fully described in a Catalogue which I have made of the Scandinavian MS. in that Library. If this Catalogue had been accessible to me, I should here have inserted the description of this, as well as some other MS. Codes.
3. Jónsbók, or Magnúss Lagabætir's Code for Iceland, printed on Holum (in Iceland).
   There are also several MS. of this code in the Advocates' Library.

(b) Norwegian Codes.

4. *Gulathings Lög hin Fornu.*
   There is a neat MS. on paper of this Code in the Advocates' Library.
5. *Gulathings Lög hin nyu*, or the Gulathing's Law of king Magnus Labætir, promulgated about the year 1274. Published at Copenhagen with a Latin version, 1817, 4to.

6. *Kaupstada Rettr*, *i. e.* Town Law for the city of Bergen, promulgated 1274.
   A Danish Translation is to be found in "Hans Paus Samling af Gamle Norske Love, *i. e.* Hans Paus's Collection of Ancient Norwegian Laws, Copenh. 1751, 3 vols. 4to.
7. Frostathings Lög.
   In the last quoted Collection.
8. Biarkeyar Réttr.
9. Gamall Kristin Réttr. *i. e.*
   An ancient Ecclesiastical Law.
10. Magnusar Lagabætis Thrænda Lög.
    A Code of king Magnus for the ancient city of *Nidarós*, now called Drondheim.
11. Kristinréttr Jóns Erkibiskups, *i. e.*
    Ecclesiastical Law of Archbishop John.
12. Ancient Royal Edicts of the Kings of Norway.
    All subsequent to No. 6. see in Hans Pans's collection.
13. Kong Christian den Femtes Norske Lov. The Norwegian Law of Christian the Fifth.

(c) Swedish Codes.

14. Swerikes Landzlagh Stockh. 1665, fol.
15. Swerikes Riikes Stadzlagh (Town Law for Sweden), Stockh. 1665, fol.
16. Uplandzlaghen, Stockh. 1665, fol.
    Amended by king Byrgher Magnusson, Anno 1295.
17. Wästgötha Laghbook, Stockh. 1663, fol.
    The Law of the West Goths.
18. Oestgotha Laghen, Stockh. 1665, fol.
    The Law of the East Goths.
19. Sudhermanna Laghen, Stockh. 1665, fol.
20. Wästmanna Laghbook, Stockh. 1666, fol.
21. Hælsinge Laghen, Stockh. 1665.
22. Then Gambla Skäne Lagh, Stockh. 1676, fol.
    This Code may, with more propriety, be classed with Danish Codes, as it was promulgated at a time when Scania was a part of the Danish dominions; still it is by Swedes reckoned as one of their Codes.
23. Jura Ecclesiastica Scanensium.
24. Koningh Ericks Lagh.
25. Dahlc Laghen, Stockh. 1676, fol.
26. Biärköä Rätten, Stockh. 1676, fol.

27. Nägra Gambla Stadgar.
Some old statutes from the time of king Magnus Ladulås, C. A. 1280.

28. Gothlandz Laghen, Stockh. 1687, fol.
This Code is so old, that the idiom in which it is written, is almost pure Norse, *i. e.* Icelandic: the Swedish editor calls it *Ancient Gothic.*

29. Wisby Stadz Lag på Gotland, Stockh. 1688, fol.
The Law of the city of Wisby on the Island of Gothland.

30. Then Gambla Wisby Siö Rätt, Stockh. 1689, fol.
The ancient Maritime Law of Wisby.

31. Sweriges Rikes Lag Gillad och antagen på Riksdagen år 1734, Stockh. 1746, 4to.
The Law of Sweden ratified and accepted by the diet in the year 1734.

(d) Danish Codes.

32. Kong Waldemar den Förstes Siellandshe Lov.
The Sealand Law of K. Waldemar I.

33. Constitutiones Waldemari Regis.

34. Den Dalbyeske Forordning, *i. e.*
The Statute of Dalby.

35. Kong Waldemar II. Jydske Lov.
The Jutland Law of K. Waldemar II. promulgated about the year 1240.

36. An Old Latin Translation of the Ecclesiastical Law of Scania.

37. Statuta Ecclesiastica Andreæ Sunonis.

38. Jus Slesvicence Antiquum.

39. Jus Civicum Ripense.

40. Kong Christian den Femtes Danske Lov. The Danish Law of king Christian V.
Many other Danish Codes have been consulted besides these.

(e) Saxon Codes.

41. Saxonum Leges Tres, quæ exstant Antiquissimæ. Accessit Lex Frisionum cum notis Sibrandi Siccamæ. Lipsiæ 1730, 4to.

42. Sachsenspiegel.

(f) Attic Laws.

43. Leges Atticæ, Samuel Petitus collegit, digessit et libro commentario illustravit. Parisiis 1635, fol.

II.—WORKS ON SCANDINAVIAN AND ICELANDIC JURISPRUDENCE.

44. Kofod Anchers Danske Lovhistorie, 2 vols. 4to.
45. Arnesens Islandske Rettergang, 4to.
46. Nettelbladt Selecta Juris Svecici, 4to.
47. Ejusd. Themis Romano Svecica, 4to.
48. Blackstone's Commentaries.

III.

49. & 50. The Eddas.

IV.—SAGAS, AND OTHER HISTORICAL WORKS.

51. Niáls Saga.
52. Eigla.
53. Grettla.
54. Bandamanna Saga.
55. Heimskríngla Snorra Sturlusonar.
56. Olafs Trygguasonar Saga.
57. Laxdæla, and a great number of other Sagas.
58. Saxo Grammaticus.
59. Torfæi Series Regum Daniæ.
60. Rask om det Islandske Sprogs Oprindelse.
61. Magnuson's Eddlære.

All the aforementioned works are to be found in the Advocates' Library, except the Poetic Edda, of which work it possesses only the two first vols.

CONTENTS.

LIST OF MISPRINTS AND EDITORIAL OVERSIGHTS.

Page 4, line 10, from the bottom, to the words *Duodecimviri legis emendandæ*, add vel xlviii, vel cxliv viri.
—— — — 3, Vindalin *lege* Vídalin, et Gunlang, *lege* Gunnlaug.
—— 20, — 11, *lege* Conring.
—— — — 19, — Conring, et ubiqne Conring.
—— 29, — 18, — Sealand.
—— — — 23, — Sealand, et ubique Sealand, pro Zealand.
—— 47, — 3, — therefore.
—— 67, — 2, from the bottom, *lege* Brynjúlfsens.
—— 87, — 6, in the note, *lege* But we find.
—— 96, — 7, which the king swears, *lege* by which the king obliges himself.
—— 98, — 18, *lege* Thieves'balk.
—— 104, — 12, from the bottom, after the words, with the fact, put a *colon* instead of a *comma*.
—— 143, — 16, *lege* Tylter Eed.
—— 147, — 24, after the words, "long fallen into disuse," add, and this was during a period when all institutions of the country were gradually advancing to the most absolute monarchy.
—— 150, — 16, expunge the word "and."
—— 151, — 7, from the bottom, expnnge the word "yet."
—— 158, — 41. *lege* fieri.
—— 154, — 2, from the bottom, *lege* 885.
—— 171, — 14, sometimes, *lege* sometime.
—— 174, — 1, would, *lege* conld.
—— —— — 8, from the bottom, expunge the word "as."

ON

TRIAL BY JURY

IN THE

SCANDINAVIAN COUNTRIES, AND IN ICELAND.

§ 1.

AMBIGUITY OF TERMS.

THE history and doctrine of Scandinavian Juries is difficult and intricate, for the following reasons :—

1. They have different names in different countries; their appellation in Iceland, is different from that which was customary in Norway; in Sweden they have another name, another again in Denmark.

2. We also find, that in different codes of the same country, the name of the Jury varies: in the two Iceland codes, the *Grey-goose* and the *Jóns-bòk*, they are differently stiled. In the numerous old codes of Sweden, they have a variety of names.

3. In Denmark there were four distinct species of Juries, each of which had a peculiar name; and not only the *name* varied, but the thing too, for they were differently chosen or nominated, and differently constituted; they had different powers and functions, and were employed in different causes.

4. We must also attentively mark the gradual degeneracy and decline of this institution. In Sweden, the Jury of the time of Earl Byrger differs very much from that of Charles the Ninth; and that of Ponte Corvo is very different again from both of these. The Danish Jury of the thirteenth century, which was the golden age of Juries in that country, little resembles that of the seventeenth century, when hardly any thing remained but the name.

5. In some cases, the Jury, and the Deputies or Representatives of the people in the Legislative Assembly, bear the same name. In Norwegian codes, *Lögréttumadr*, (in plural *Lögréttumenn,)* means a Juryman; in Iceland this appellation has in some codes the same signification, but in the oldest code of Iceland, it means a Deputy in the Legislative Assembly. For these, as well as some other reasons, we must acquire a familiar knowledge of the Scandinavian form of process, of their courts of law, and even of their Legislature, before we can rightly understand the passages in the codes, or in ancient historical works, which refer to any one of these subjects.

§ 2.

TERMS.

The knowledge of terms being conducive, nay, indispensable to the accurate knowledge of any given subject, we shall here enumerate the appellations which we find have been applied to Juries in Norway, Sweden, Denmark, and Iceland. As the language of these countries was one, even without remarkable difference of dialect, at least down to the 12th century, it would not be right to distinguish these terms according to diversity of idiom, as that diversity first appears in latter ages. Till the period here mentioned, all these nations spoke that tongue, which now (because at present it is only spoken in the island of Iceland) is called Icelandic. In earlier ages, while it was common to all, it was sometimes called NORRŒNA, sometimes the Danish Tongue. Modern Danish or Norwegian, (for these are one,) as also Swedish, are only daughters of this language, resembling it as closely as Italian and Spanish resemble Latin, and more closely than French or Portuguese resemble their Roman parent tongue. Swedish in particular, still resembles Icelandic, nearly as much as modern Greek resembles ancient Greek. This accounts for the fact, that the roots of all the terms for Jury used in Denmark, in Norway, or in Sweden, can only be satisfactorily explained from the Icelandic.*

* The identity of Icelandic with NORRŒNA, or ancient DANISH, has been so clearly shewn by many learned authors,

Hereafter will be shewn, what terms were used in each country; here we shall enumerate them all together, with a short verbal explanation. *(Descriptio Nominalis sive Literalis.)*

Kvidr, *Kvöd*, } Nomination, the jury being named or chosen.

Kvidmenn, *Kvidarmenn*, } Nomination men.

Buakvidr,—Nomination of landholders.

Heimilisbuar,—Home-dwellers; this means neighbours.

Vetvángs-búar,—Neighbours.

Sóknar-kvidr,—A prosecution jury.

Biarg-kvidr,—A jury for the defence.

Búda-kvidr,—A nomination from the tents or huts in the Althing, or the Legislative Assembly in Iceland, where juries were very often summoned.

Nefnd,—Iceland.
Nämnd, *Nämd*, } Swed.
Nœvne, *Nœvninger*, } Dan.
} Nomination.

Nefndarmenn,—Nomination men.

Istadamänn,—Qui ab alicujus parte stant, vel staturi sunt.

Sannindamenn, *Sannœndmœn*, *Sandemen*, } Veridici.

Lögréttumenn,—Duodecim viri legis emendandæ.

Eidr,—Oath.

Lirittar-eidr,—Three men's oath.

Settar-eidr,—Six men's oath.

Tyltar-eidr,—Twelve men's oath.

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that no fact in history is supported by more convincing arguments. The principal authors who have written on this subject, are Paul Vindalin, *(see Appendix to Gunnlang Ormstunga's Saga,)* and Rask in his Icelandic Grammar, his Anglo-Saxon Grammar, *et passim alibi.*

Lov,—Law. Strange as it may appear, this was in Denmark the appellation of a particular kind of jury, which, during one period in Danish history, was most frequently employed: It is identical with the English WAGER OF LAW.

The reader will observe, that these terms are not all general, but some only appellations of a particular species of Jury, as hereafter will be shewn. The real explanation, *(Definitio sive Descriptio Realis,)* is to be sought in the succeeding paragraphs.

§ 3.

ANTIQUITY OF JURIES.

Respecting the antiquity of Juries, perhaps we ought to say nothing more than this, that their origin lies beyond the age of *clear* history. Yet the history of Scandinavia is clear and authentic from the beginning of the ninth century, or the year 800. In none of the many historical works which still are preserved, do we find Juries mentioned as a recent institution. In the earliest allusions to them, they are spoken of as old and familiar. The oldest code of Iceland, compiled in the beginning of the tenth century, speaks familiarly of the Jury; and it is manifest that it was not then recently introduced. The most ancient Norwegian code also treats of it as well known. Kofod Ancher, who was as sagacious a critic as he was an eminent lawyer, finds admissible the testimony of the Edda, from which it would appear, that Odin introduced this method of trial into

Scandinavia. Ancher borrowed this opinion from Westphal, who had advanced it in the Preface to Tom. iii. of his "*Monumenta Cimbrica*," page 62. The Edda, however, says nothing more than this, —that *Odin* ordained the *twelve* Asagods to adjudge all causes in the metropolis of Asgard. The number twelve, which in the oldest Juries is invariable, certainly seems to characterize that institution as one of high antiquity, and to point to an age when that number was held peculiarly sacred; for as the verdict was most commonly given by the majority, an uneven number would have been preferable to avoid parity of votes; to find a remedy against which, often was a matter of no small difficulty. Saxo wishes it to be believed, that Ragnar Lodbrók, who, according to Torfæus, ruled over Denmark between the years 750 and 790, first instituted a trial by jury; these are Saxo's words: "Præterea ut omnis controversiarum lis, semotis actionum instrumentis, nec accusantis impetitione nec rei defensione admissa, duodecim patrum approbatorum judicio mandaretur, instituit. Cujus legis beneficio temeraria litium contractione summota improborum calumniæ sufficienter obviatum existimans, &c." p. 171. But the authority of this most prejudiced, partial, and affected monastic writer is so weak, that our only reason for quoting him is, that we may not seem to have overlooked him. The Saga of Ragnar Lodbrók mentions no such fact; that Saga, however, probably is of a more modern date even than Saxo. In the pas-

sage above quoted, the word *patres* denotes, in Saxo's style, respectable men of a certain age and experience; but we shall not stop to comment on the many absurdities which occur in this short passage.

There is some doubt concerning the age in which Ragnar Lodbrók lived. The calculation of Torfæus, chiefly founded on genealogy, like every opinion advanced by him, is supported by many strong reasons; still Ragnar Lodbrók's name occurs in ancient histories, connected with circumstances and events obviously too distant in time for one man's natural age. Many modern historians, and Torfæus among the rest, solve this difficulty by assuming two or even three kings of the same name and surname; but against this the want of analogy is a weighty objection. The surnames of Scandinavia were not inheritable but distinctive, and it would be difficult to find an instance of two kings of the same country, of the same name and surname. If the testimony of Saxo respecting the "*duodecim patres,*" were of any weight, the age of Ragnar would require a closer investigation: but the Edda is a much better historical authority than Saxo, and according to that record, (when Ragnar's reign is supposed to begin anno 750,) the trial by jury would be even eight hundred years older than it is according to Saxo.*

* In a disquisition respecting the antiquity of trial by Jury, perhaps Nettelbladt, a Swedish author and professor of laws, ought not to be overlooked. It is customary to quote him as

Indeed, the exact antiquity of trial by jury cannot now be determined: We discover it with the

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an authority, on the Juridical antiquities of Scandinavia. It is not, however, in any work of his own, that we are to look for information; but rather in collections of academical dissertations on Juridical subjects, which he published under different titles; such as, "Themis Romano-Svecica," Griphiswaldiæ 1729, 4to. and "Selecta Juris Svecici," Jenæ 1736, 4to. The dissertations contained in these collections were for the most part written in the 17th century; an age which, generally speaking, did not patronize criticism; but in Sweden in particular, was much more inventive and creative than discriminating. Accordingly, we find that *Rudbeck's Atlantica* is the gospel of Nettelbladt's authors. They therefore speak with confidence, and like men posscssing detailed information of remote times, of which our more sceptical age must candidly confess, that they are to us either perfectly dark, or that all the information which we glean from thence is only general and indistinct. One of Nettelbladt's authors, to whom we particularly allude, is Welt, who wrote a "Dissertatio de Legibus Hyperboreorum." This author quotes the Greek authors, Plato in particular, evidently at second hand from Rudbeck. Rudbeck had read them, but interpreted them ill; because he had read with a patriotic prejudice. In page 30. of the Themis Romano-Svecica, will be found what *Welt* has to say on Swedish Juries in the *earliest ages*:—"Solemnis fuit," says this author, "et adhuc est Hyperboreis nostris, (this term with him denotes Swedes.) Nembdæ usus, cujus offi-
"cium ante fuit de facto tantum cognoscere, examinare, sta-
"tumque causæ exponere, uti constat ex Juræ nostro." But it is manifest that the most ancient sources of information were either unknown or inacessible to this author. Ignorance of the ancient langnage of Scandinavia greatly impeded the researches of Swedes in every department of their early history: at present, Swedish scholars have become more familiar with that language.

earliest dawn of northern history, and even at that early period, as an ancient institution; beyond this, we have not enough of materials left for a fruitful investigation; but when we reflect, that the farther we go back in time, the fewer and the more remote are the relations between our customs, manners, opinions, and those of the ancients, and consequently their examples so much the less instructive to us, then we find less cause to regret the want of authentic information relative to this subject. We can trace the undoubted existence of Juries as far back as one thousand years: before that period, the history of northern Europe is wrapped in Cimmerian darkness, and we must not expect to find authentic records respecting Juries, where all other records fail. It is at the same time certain, that though the trial by Jury was early known in Scandinavia, it was not so frequently and so generally in use before the beginning of the tenth century, as it became after that period. In earlier ages, the trial by battle, hallowed by custom, and sanctioned by law, very often superseded the Jury trial. Men of rank, a term in those ages synonymous with THE VALIANT, always preferred it; it would have been deemed pusillanimous, if they had submitted any cause in which they were concerned, to a trial by Jury. The benefit of a Jury in these times chiefly fell to the weak and the aged; women very frequently appealed to it. Even after this mode of trial had become very common, the trial by battle, when

claimed with legal formalities, was admitted in preference. Egil Skallagrimson lived during the greater part of the tenth century; he had a litigation concerning succession with a man named Atli; we quote the following passage from the Saga of Egil: "When Atli entered the court with the "jurors, Egil met him, saying, that he had no "mind to receive the oath of a jury for his money. "The law which I offer, he said, is different; we "will fight a duel here in court, and let the "money be his who gains the victory. What "Egil said was indeed law, and an ancient cus- "tom, for every man had a right to challenge "another, whether he was a defender or prose- "cutor in a cause. Atli said that he would not "refuse Egil's challenge. You speak, said he, "what I ought to speak. Then Atli and Egil "shook hands, mutually ratifying their agreement "to fight. He who gained the victory was to "have the estates about which they contended*." (*Egils Saga, chap.* 68. *p.* 505. *Copenh. edition*, 1809.)

The trial by battle is, in Scandinavia, of Pagan origin. We mean not to say, that this mode of trial has not also been used by Christians; in the southern countries of Europe, we find it very common among them at a very early age. The *jus fortioris* has never been superseded by any one, whether Christian or Pagan, who could render it

* The date of this transaction is about the year 938, according to Torfæus.

available to himself; but in Scandinavia it was chiefly in vogue before the introduction of Christianity. But, as the relations of society multiplied, and consequently the causes of difference increased in number and nicety, the inconvenience of such a trial was more frequently felt; a man sometimes had a new law-suit before he recovered of his last wounds;—some were prevented by the infirmity of age from prosecuting a cause which was palpably just;—another had no sons or male relations to espouse it for him;—a difference occurred with a person against whom fighting was forbid even by the law of honour, such as a near relation, a foster-son, or a foster-brother, perhaps even a priest;—nay, (and which is the strongest reason against the trial by battle with most men,) some were fully persuaded of the justice of their cause, but at the same time as fully persuaded of their antagonist's superiority in strength or dexterity at arms.* Now, if such a man was the King's, or

* It would be easy to furnish instances of all the cases here mentioned from the Sagas. The Laxdæla Saga contains an affecting instance of a man refusing to fight against his foster-brother. The passage is thus given in Mr. Repp's translation:—"Tunc Kjartanus Bollium ita est allocutus: jam "certe cognate! flagitium perpetrare statuisti, mihi autem "multo melius placet, ut tu mihi mortem inferas, quam ego "tibi. Projectis tum armis, Kjartanus noluit sese defendere, "pauca tamen acceperat vulnera: gravis autem pugnæ lassi- "tudo urgebat. Kjartani dictis Bollius responsum quidem "reddidit nullum, mortiferum tamen intulit vulnus. Bollius "cadentem gremio excepit, ita Kjartanus expiravit."—*Laxdæla Saga, Hafniæ* 1826, *4to. p.* 223.) Among other instances

(after the introduction of Christianity) the Bishop's friend, he was accommodated with a more convenient trial than that of the sword. Even in states like Iceland, where the government was popular, or at least aristocratic, public opinion exempted him from fighting in such circumstances.

Thus the trial by battle gradually became unpopular. Confirmative of this, GRETTIRS SAGA (the history or biography of Grettir, an Icelander) has the following passage of Earl Erik, who ruled over Norway in the beginning of the eleventh century.

" Earl Eric was an able ruler; it was a great " grievance at that time, that adventurers and " BERSERKS challenged landowners, and even " noblemen, to fight duels for money and for " women; no compensation or redress was made " for a man killed in such a duel; many were " dishonoured, and some slaughtered. There- " fore Earl Eric abolished all duels; he also out- " lawed all robbers and berserks who disturbed " the kingdom. In this the Earl was assisted by " a gentleman called Thorfinn Kársson of Hamar- " sey."—Grettir's Saga, Chap. xxii.

Eric was a new converted Christian; in the

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of a man declining a challenge, though legally offered, on account of the antagonist's superior skill and dexterity, one is recorded in the Niála, where Hrútr declines the challenge of Gunnar, and according to his brother's advice, pays down a considerable sum of money, claimed by Gunnar for his female relative Unnur, who had been divorced by Hrútr.

naval battle of the Baltic against Olav Triggvason, King of Norway, he had made a vow, that if he gained that battle he would receive baptism. Policy, no doubt, dictated this vow; for Olav had previously converted the greatest part of Norway to the Christian faith, and therefore the vow might be as effectual for procuring the favour of man as of God; and probably the former motive was at least as powerful with Eric as the latter.

Thus, then, when the Christian faith began to be generally received in the north, the trial by battle was fast declining, though not abolished; and the trial by jury would immediately have become universal, as a preferable and more satisfactory mode of trial, if the clergy, who soon gained a strong influence both with kings and subjects, had not introduced a new mode of trial, which they well foresaw would secure and strengthen that influence. This was the Christian ORDEAL: For there had indeed formerly existed Pagan ordeals, but these had deservedly fallen into disuse. The motive and origin of Christian ordeals was this:—The clergy had to preach a new faith to people slow of belief. The arguments which they advanced in its support were chiefly recorded or traditionary miracles. Their sceptical hearers naturally demanded, Shew us one such miracle, and we will believe. The force of this ratiocination has always been admitted by the Catholic clergy, and they set about making miracles accordingly. We quote the following authentic story from Saxo,

who, in this particular, is worthy of credit; because he agrees with many contemporary writers. When Bishop Poppo had been for some time haranguing the people of Jutland, and preaching the new doctrine with little success, he at last exclaimed, Will you believe if I handle a red-hot iron without scalding my hand? A number of the assembly, anxious, no doubt, for such an entertainment, instantly responded, Aye, that we will. Poppo accordingly ordered a glove of iron to be made; when it was red-hot, he drew it on, and, after keeping it on for a reasonable time, took it off again, and, like any other fire-king, exhibited his hand unhurt. This miracle,—for such it truly was in that age,—made a surprising impression on the Danes: they immediately rushed in crowds to the baptismal font. Nay more; as miracles are always popular, they resolved to commit the issue of their differences to miracles, enjoying the double gratification, at once of beholding a miracle, and having a dispute settled in a quick and summary way; doubtless also, shrewdly guessing that the priest could and would miraculously turn the scale of justice in favour of him who gave him the handsomest present.

After recording this miracle of the red-hot iron glove, Saxo adds: "Quo evenit, ut Dani, abro-
"gata Duellorum consuetudine, pleraque causa-
"rum judicia eo experimenti genere constatura
"decernerent; controversiarum examen rectius
"ad *arbitrium divinum*, quam ad *humanam rixam*

" ablegandum putantes." This same miracle is also recorded by Snorri Sturluson, and Wittechind; and by them rightly referred to the reign of Harald Bluetooth, *(Blátönn.)** Saxo incorrectly states it to have been performed in the time of his son *Sveinn Tiúgusk*ę*gg*.

All writers agree in this, that this same miracle of Poppo was the first cause of the introduction of Christian *ordeals* in Denmark, and even in Scandinavia: this is a point which Ancher considers as established; and the clergy very naturally endeavoured to substitute for every other kind of trial, what they termed the *judgment of God*, as it cannot be doubted that they derived considerable emoluments from it, whenever it was resorted to. After this miracle, ordeals were frequently used in all the northern countries, particularly in Denmark, and more especially in that part of Denmark which was called *Scáney*, or Scania, and which now is a province of Sweden. This country being the southermost part of the Swedish peninsula, was at that time considered as the most important part of Denmark; and Waldemar I. presented it with a peculiar code of laws, still preserved, and known under the name of Skaanske Lov, or *Lex Scanica*, in which the ordeal of hot iron is expressly ordered to be employed, particularly in cases of theft. However, not very long after the promulgation of this law, this ordeal was abolished by Waldemar II.

* Poppo wrought his miracle about the year 950.

either a few years before, or immediately after the Lateran Council, which in 1215 issued a general prohibition against ordeals, forbidding the clergy to sanctify cold or warm water, or red-hot iron, which were to be employed for the absolution of guilty persons. *

These, then, are the cardinal points, the *gravissima momenta* in the history of Scandinavian judicatories: the TRIAL BY BATTLE; the ORDEAL; and the TRIAL BY JURY. Theorists will assume, that the trial by battle is the most ancient mode of trial; but for ought we know, the trial by Jury is, in Scandinavia, of equal antiquity: for no record whatever exists of Scandinavian affairs prior to the arrival of Odin. Odin was not only the first god of the northern nations, but also the first man. Not that there were no inhabitants in the north of Europe before his arrival; but nothing is known of them except their mere existence; and even that is only known from their conflict with the Asiatic Odin and his followers.

It is certain that the useful, as well as the elegant arts, were first taught by Odin; that he

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* Shortly after this prohibition of the Lateran Council, ordeals were by public edicts abolished in other countries; as in England anno 1219, by Henry III. in Sweden and Norway only anno 1248, and in these latter countries not by a royal, but by a cardinal's edict. This was Cardinal Wilhelmus, who ordered exile as a punishment for those who should make use of ordeals, saying that it was improper to tempt God, by claiming his immediate testimony in secular affairs.

introduced architecture and Runic letters; nay, that he made the language which he spoke predominant in the countries which he conquered, and that a few centuries after his disappearance, (had he not been a god, we should have said his *death,)* there remained no vestige of any other, or more ancient language than his;—that he also was the first legislator of the northern nations;—that his laws were martial in a very high degree, even more so than those of the Spartan lawgiver.—It is therefore not improbable that the trial by battle is one of his enactments: at any rate, as he promised the highest felicity in the world to come to those who fell in fight, such a mode of trial was at all events thereby rendered popular.

But that he was the author of the trial by Jury, is a position supported by stronger proof than a mere plausible conjecture. The Edda almost expressly states that he was so; and if the fact be admitted, it must now be about 1900 years since the introduction of this mode of trial into northern Europe.

The Christian ordeals only subsisted during two centuries and a half; and although during that period they were frequently used, they were always looked upon with suspicion and distrust by the greater number of the laity. We have also seen that the insufficiency of the trial by battle was early felt: thus, while each of the three modes of trial struggled for pre-eminence, that by Jury was always considered the most NORMAL. Hence the

appellation LAW, which in Denmark was applied to a Jury of a peculiar description.* For even while the ordeals and trial by battle were recognized and admitted by law, every one felt that the trial by the country was far more LEGAL: That trial was the law, κατ' ἐξοχήν, even though the other trials were not contrary to law; and this superior lawfulness, or legality, the ancients vindicated in the strongest manner by the very term.

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* The Danish Lov or Law, is, indeed, in almost every instance, identical with the English WAGER OF LAW, as described by Sir William Blackstone, (B. III. chap. 22. § 6.) In enumerating the different ancient modes of trial used in Great Britain, this learned author, beginning with trials which were most in use while society was as yet in a rude state, uniformly proceeds to those which better agreed with culture and refinement. In a series thus arranged, the *Wager of Law* immediately precedes the *Trial by Jury*. It would have been more philosophical, and more in accordance with strict system, not at all to separate the Wager of Law from the Trial by Jury; but to treat of them conjunctly under one head, as the former is only a variety of the latter: the Wager of Law being a trial by Jury in a rude state, and the Jury trial a Wager of law refined, organized, and improved. This view of both respectively, would have forced itself on the notice of Blackstone, if he had been better acquainted with the ancient form of process in Denmark; but it appears that only one work on the juridical antiquities of Scandinavia (viz. Stiernhööks) was known to Blackstone. This author's information is, however, on account of his imperfect knowledge of the ancient tongue, often exceptionable, and besides, confined only to Sweden. The Wager of Law corresponds with the Twelve-men's-oaths, and Six-men's-oaths, of Sweden, Norway, and Iceland; and probably also, with a similar institution among the Saxons and Frisians.

In fact, it cannot be said the most ancient codes sanction any other mode of trial than that by Jury. In none, not even in those of the tenth century, is the trial by battle mentioned,—and very few have prescribed the ordeals; these latter were ecclesiastical inventions, and therefore we have to look for them chiefly in the ecclesiastical codes: But all the ancient laws teem with the various forms of Jury trial; they contain minute and elaborate regulations respecting its form, its application, and its contingencies, and prescribe its use in almost every page. Arnesen (Islandske Rettergany, pag. 148.) is of opinion that we have lost the ancient Pagan codes, in which he surmises that the trial by battle was ordered: Both the one and the other position is incredible, and destitute of proof.

None of these supposed Pagan codes, which are conjectured to have been lost, are (with one doubtful exception) ever quoted by the ancient authors, although those which still exist frequently are; thus the supposition of Arngrim Johnson. That the trial by battle was only established by ancient custom, and that it was never enjoined by any written law, is far more plausible; as it also is highly probable that the Norwegian code, (the Heidsifia-law,) which still exists, is the most ancient that ever was compiled in Scandinavia, and that before its publication, no written law existed.

From these considerations, it may be inferred

that the trial by Jury is the most ancient STRICTLY LEGAL mode of trial in the northern countries.

§ 4.

There was a time when it would have been thought worth while to enquire whether any enactment respecting trial by Jury occurred in the SACHSENSPIEGEL, as formerly the error was universal among Jurists, that this silly code was compiled in the time of Charlemagne ; but that error has long since been dispelled by the learned lawyers of Germany. Couring,* in particular, has proved that the Sachsenspiegel was compiled subsequent to the year 1230, and yet very near that period, (for the date cannot be ascertained within five or six years.) This, too, is the period to which a mere linguist, unaided by jurisprudence or history, would refer this production.† If any obstinate sceptic should even now, after the question is settled, doubt Couring's arguments, strong as they are, he will, in the Sachsenspiegel itself, find manifest proofs that it was written after the Lateran council, (anno 1215,) as it mentions a prohibition against matrimony in the fifth remove,

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* De Orig. Jur. Germ. cap. 30.

† Sachsensp. I. 3. The author of this code, is either *Ecko de Repkau*, or Count *Hoyer*. The latter, in all probability, originally composed it in Latin, and Repkau only translated it into German.

which was first issued by that council under Innocentius III.; but the Papal bull on the same subject, was only published anno 1230; and from this circumstance, it is most probable that the Sachsenspiegel was written subsequent to that year.

Long before this period, we find trial by Jury established, and completely organized, in Great Britain, as well as in other northern countries: the authority of the Sachsenspiegel,—the most crude collection of ancient customs, moral precepts, legendary divinity, and nursery stories, that the 13th century ever produced,—is therefore of no avail.* Yet if there be those who think differently, they will, in this code too, find something analogous to this judicial institution, although it is not certain whether it is to be considered as trial by Jury, strictly speaking, or as Wager of Law. The Jury of this code appears to be identical with the northern *Lirittár-eidr* and *Settár-eidr*, and the leading feature of the system is, that the defendant is ordered to swear along with the conjurators, who are sometimes three, and sometimes six in number.—Sachsensp. I. 8, 15, 25, 66, 70. II. 6, 22, 69. III. 28.

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* There is often much of extraneous matter in the law codes of this period: the Partidas of Alonso X. contain many philosophical dissertations on ethics, the education of princes, &c. Still Alonso's code is infinitely better in every respect than Ecko de Repkau's.

§ 5.

The case is quite different with regard to the ancient Saxon as well as the Frisian law: two codes,—if that which might easily be printed on a sheet of paper deserve the name,—undoubtedly of high antiquity; and if as ancient as their editors have pretended, one of the most ancient now-existing literary monuments belonging to the Teutonic nations. Even if their antiquity be not quite so high, their weight and importance, as regards the history of jurisprudence, are very great; nay, they become still more interesting to us, if it were proved, that they were a century more recent than has been supposed by their editors. Their great consequence has been felt by learned lawyers, and therefore the Saxon law in particular has been an apple of discord between them. There is, in fact, no other ancient monument of such an importance as the Saxon and Frisian law, for the history of jurisprudence in Northern Europe. If our notions respecting the origin of these codes happen to be false, it is a necessary consequence that we must misplace and anachronize a long series of juridical facts; and if they are right, thereby the first foundation is laid for an accurate history of Northern Jurisprudence. We may therefore be excused for devoting a separate paragraph to the consideration of these two ancient codes, more especially as by

these codes a trial by JURORS is enjoined in almost every page.

The Saxon law is written in Latin: it was discovered in the library of Fulda, and first edited at Basel by John Herold, in the year 1557, in his "Origines ac Antiquitates Germanicæ," pag. 121. Next after that followed the Tilian edition, Paris 1573. Lindenbrog published his first edition at Hanau 1607. Leibnitz printed this same code in his Script. Rer. Brunsv. Tom. I. p. 77.; and Gærtner published "Saxonum Leges tres quæ ex-" stant antiquissimæ ætate Caroli Magni confectæ: " notis illustr. Accessit Lex Frisionum, cum notis " Sibrandi Siccamæ. Lips. 1730, 4to." Some of the German lawyers,—great names too,—not content with an antiquity so low as the time of Charlemagne, assert that this code was compiled by his grandfather or great-grandfather. So far can learned men be led astray by their zeal, as to forget or overlook even impossibilities, in order to establish a favourite theory!

1. The Saxon law is written in Latin, a language unknown in Saxony before the time of Charlemagne. Such a law would at that time have exactly the same effect on the Saxons as the two tables of Moses, or the laws of Menu, laid before them in the original tongues.

2. It is a *Christian* code,—a circumstance equally unfortunate for those who maintain that it is given to the Saxons before the age of Charlemagne, the Saxons being at that time heathens.

3. It is a code addressed to Saxons, over whom the ancestors of Charlemagne had no authority, and with whom they had little or no intercourse.

The circumstance, that some learned authors have, in spite of these insurmountable difficulties, pretended that the "Leges Saxonum" were compiled by the ancestors of Charlemagne, shows that the proofs of their being compiled by him, or during his reign, cannot be very strong, neither has there in fact any thing been discovered or invented which amounts to a proof, or even to a *probatio semiplena.*

It would really seem that this conjecture has no better foundation than just *one* word in the code itself: "Qui in Regnum vel Regem FRANCORUM, "vel filios ejus de morte consiliatus fuerit capite "puniatur,"—Sax. Leg. Tit. III. § 1. Now, if the word FRANCORUM is a true reading of the text in membrane, a thing which only can be decided by a re-examination of the original copy, how easily might it have been substituted for another* by an ignorant transcriber, or even by one who had a historical theory of his own to establish,†—who happened to know that the Saxons had once been under a French dominion, but was wholly ignorant of their having ever acknowledged any foreign rule. But Lindenbrog himself betrays too strongly

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* "DANORUM," for example.

† The monks very frequently practised this kind of deception.

the weakness of his evidence; for he even adduces the peculiar form of the character in which the MS. is written, as also the quality of the membrane, as a proof of its antiquity: he can clearly see that it is written before the time of Charlemagne!! MSS. of so high an antiquity are very scarce, and we may fairly ask with how many such he compared the Fulda MS.? Such arguments were no doubt excellent in the beginning of the seventeenth century; but the nineteenth is more sceptical.

Spelman, in his Glossary, under the word LEX SAXONUM, attributes this code to Harald Bluetooth, king of Denmark, whose long reign reached as far downwards in time as 984. In this opinion, Spelman appears to be supported by Adam of Bremen, by Helmold, and by Albert. We shall only quote Adam, as being the oldest:* "Certissimum vero "est eum (*sc.* Haraldum) tam nostro populo, "quam *Transalbianis* et *Fresonum* genti leges et "jura constituisse, quæ adhuc pro tanti auctoritate "viri servare contendunt."† But are the laws which Harald gave to the Transalbians and Fresians identical with the *Leges Saxonum* of Fulda, and with the Frisian laws which Siccama edited? We cannot say that this is certain, but it is at least highly probable, and this undoubtedly was Spelman's opinion. Still Kofod Ancher, though he

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* He lived during a great part of the eleventh century, and died before the commencement of its last quarter.

† Hist. Eccl. L. II. c. 19.

has taken great pains to prove that Harald actually gave laws to the Frisians and Saxons, dares not maintain that his laws are the same as those of the Fulda MS. He has, no doubt, been frightened by the word FRANCORUM, or perhaps by the Latin idiom in which this code is written. Harald certainly did not write Latin, but his bishops and clergy did; and as the Frisians and Saxons did not understand Danish, there was no other way of conveying to them the meaning of a law, but through the medium of the diplomatic language of the clergy.

Further grounds of probability are to be found in the striking similitude between these two codes themselves in style, technical language, and precepts, all of which indicate that they must have emanated from the same source,—their equally striking similitude to the ancient northern codes in all respects, which appears in every line,—their brevity and conciseness, in which they vastly differ from other German codes, but resemble the northern,—the similarity of customs and institutions to which they allude, with those of the northern nations. In these codes, *probatio* or *negatio facti*, is accomplished by three, six, or twelve jurors; in high criminal cases, always by the last number. Now, these numbers correspond exactly with the numbers prescribed in all the Scandinavian codes, in which we find almost always three jurors in cases of debt of a small amount, and in other minor property cases, —six jurors, in such criminal cases as were not

capital,—and in criminal cases of the highest description, and also in the most important property cases, twelve; so that their rules in this particular perfectly correspond with the Saxon law.

Homicide, when not accompanied with very aggravated circumstances, is, in the Saxon, as well as the northern laws, punished by fine; and in both, the fines vary according to the dignity of the person. There is, however, this difference, that the Saxon law modifies the fine, according to the different degree both of the slayer and the slain; while the northern law chiefly takes the rank of the slain into consideration, without much attending to the rank of the slayer.

In the Saxon and Frisian law they reckon by solidi; in the northern laws, by marks, hundreds, and ores. Now, taking into account the comparative wealth of the respective countries, and the difference which exists in the money standard of each, we are warranted in coming to the conclusion, that a considerable correspondence exists between them.

In both codes the same wounds are described, and provision is made for the very same cases of mutilation, and similar fines exacted. Indeed the resemblance is frequently so striking, that it would lead us to consider the Saxon laws at one time a mere abstract, and at another a literal translation of the northern codes. *

* Gulathing's Law, Manhelgi-Bòlkr, cap. 3. "Ef madr "höggr haund eda Fót af mauni, eda stìngr út auga manz,

Even the barbarous words which occur in the Saxon law, can be explained without any difficulty from the Scandinavian tongue; but how successful the experiment is, when it is attempted to explain them from German, the reader will best judge by consulting Lindenbrog or Gärtner. In the Saxon law* we find, "Si quis os fregerit vel VULITIVAM "fecerit." No German derivation of this word hitherto given, comes at all near probability; but if we read ULITI VAM in two words, we have good ancient Icelandic, a good legal expression, and a clear interpreting of the passage at once. Uliti vam, spelt more correctly in the modern fashion, it would be *ulitit vam*, means a great wound, or a great injury. Vu, then, would be a mistaken reading of W, and it is one of frequent occurrence, particularly as the German reader would not easily guess that *w* was a vowel; and supposing it to be

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"eda skér túngu ur höfdi manz, eda geldir, eda meidir hann "at vilia sinum." The very same cases are mentioned in the Saxon Law, Tit. I. § 11.—§ 15. incl. In § 8. the Saxon law has, "Quicunque Gladio stricto super alterum cucurrerit "XII Solidos componat." The Gulath. L. Mannh. Bólkr, cap. 21. says, "If a man attacks another man, but others pre-"vent him, then he pays damages according to the sentence "of six prudent men, and two *ores* to the king." By the Gulath. Law, the damage for adultery is the same as for homicide, Mannh. B. chap. 5. By the Frisian Law likewise, Tit. IX. § 1. seqq. In the former, the damage is called *Manngiauld*, in the latter the term is *Weregildum*, which is a literal translation of the former. *Ver*, a man, is also a Scandinavian word, and not Teutonic.

* Tit. 1. § 5.

a consonant, he found it impossible to pronounce it. I feel morally certain that the word is spelt in the Fulda MS. thus, VVLITI VAM, where the double *v* has the power of our accented Icelandic ú, as frequently is the case in northern MSS. But if we suppose this reading slightly corrupt, and read ANLITI VAM, (wound in the face,) for Vuliti vam, then we have the very same injury, which is in the northern codes punished by a fine of more than ordinary severity.

Although the resemblance between the Norwegian and Swedish codes on the one side, and the Saxon and Frisian law on the other, is sufficiently obvious, the resemblance between the Danish and the latter codes is still more striking. Here we find whole chapters where word is almost given for word. Whoever will compare the ancient Zealand Law, Book II. chap. 1.—12. incl. with Tit. I. of the Saxon Law, from beginning to end, or Tit. XXII. of the Frisian Law, will find manifest and convincing proof of the common source of these ancient codes.

It is true the ancient Zealand law is of no older date than the earlier part of the 12th century; and although the antiquity ascribed by the editors to the Saxon and Frisian laws may be fairly doubted, there are at the same time reasons for supposing them more ancient than the Old Zealand law. Yet there is not the least probability that any thing was directly adopted from the Saxon and Frisian codes into the Old Zealand law, if the former are sup-

posed to be of an origin foreign to Denmark; but if they are, as seems to be the opinion of Spelman, the same body of laws which was given by Harald Bluetooth to the Saxons, then their resemblance to other ancient Danish codes is easily understood; and in that case, the ancient Zealand law would be only a *rifacciamento* of the Haraldine laws, of which the Leges Saxonum et Frisionum were only localized translations.

Such a conclusion can hardly appear too bold, when the whole train of circumstantial evidence on which it is founded is fairly considered. The northern spirit of the Saxon and Frisian laws,—the Scandinavian origin of the barbarous words occurring in them,—the clear testimony of ancient writers of Haraldine laws given to the Saxons and Frisians,—the utter deficiency of any clear proof as to their Carolingian origin,*—the positive dis-

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* The following is one of the strongest arguments by which it is attempted to prove that Charlemagne compiled the Leges Saxonum :—" Omnium nationum, quæ sub ejus ditione erant, " jura quæ scripta non erant, describi, ac litteris mandari " fecit."—Eginhard in vitâ Car. M. Another is from a Saxon annalist, by which learned authors wish to prove that Charlemagne first collected the unwritten traditional law of the Saxons. The annalist says, or sings, as follows :—

" Tum sub judicibus, quos rex imponeret ipsis,
Legatisque suis permissi legibus uti
Saxones patriis et libertatis honore."

But where are the judices of the Saxon law? Or are they perhaps only introduced *per licentiam poeticam?* For it is a truth and of verity, that the " Lex Saxonum" speaks of no

similitude between these laws and other Teutonic or Frankish institutions,—their barrenness of ecclesiastical enactments, of which the laws of Charlemagne have such abundance, as ought to have procured even to him the title of Most Christian Majesty,—the perfect compatibility of this circumstance with a Danish origin, ecclesiastical influence having always been weaker in Denmark than in the southern countries,—and lastly, the fact that a law essentially similar was adopted by a mixed colony of Danes and northern Germans, who had long settled in Great Britain, and that the very same institutions were embodied in the laws which the Danish Canute, a successor of Harald Bluetooth, gave to his English subjects.

It is surprising that Gærtner, publishing "Caroli Magni Capitularia de Rebus Saxoniæ," did not observe the difference between these and the "Leges." In the former, every paragraph is ecclesiastical,—in the latter, all is secular. The Capitularia are laws exactly of the description which a Christian conqueror would give to heathen subjects, partly converted, and partly to be converted. But nothing of that nature appears in the

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judges, but of jurors. The Fulda code too,—"incipit in nomine Christi." This looks like a northern blunder. The clergy of the southern countries made all commencements in "nomine Jesu." Only hyperborean clergy would be ignorant that the word Christ was a title of dignity or office, and not a name.

"*Leges.*" In other respects, so dissimilar is the spirit of the Leges and the Capitularia, that some learned authors have supposed that the latter were either the foundation of the Westphalian Wehmgericht, or that they were expressly written to support that secret tribunal; but the Leges are, like all other northern laws, adapted to the most public and popular form of process that can be imagined.

There is, however, one circumstance which appears to be decisive, and to which the editors have not attended. The Capitularia are by all authors attributed to Charlemagne, and I think they are justly so. They were found in the Vatican, by the Prince-Bishop Ferdinand Fürstenbergh, during the pontificate of Alex. VII. and edited by Lucas Holstenius.* The Vatican was of all places the most likely to have been the depository of these laws. The latter of these Capitularia has a date at its beginning, besides which, there are other circumstances which prove them to have been published by Charles. Now these Capitularia and the Leges contain enactments flatly contradictory. In the first chapter of the Capitularia we read as follows: "Si quis confugium fecerit in Ecclesiam, "*nullus* [nemo is meant] eum de Ecclesia per vio- "lentiam expellere præsumat, sed pacem habeat "donec ad placitum præsentetur; et propter hono- "rem Dei sanctorumque ipsius reverentiam, con-

* No "Leges" were there along with them.

" cedatur ei vita et omnia membra." But in the " Leges," Tit. III. § 5. " Capitis damnatus, NUS- " QUAM habeat pacem. Si in ecclesiam confugerit, " REDDATUR." There can be no doubt that this *reddatur* means *tradatur ad supplicium.*

It is needless to observe how extremely improbable, nay, impossible it is, that Charlemagne would, on such a particular point as the privilege of sanctuaries, issue laws so contradictory to half-converted heathens. But we may further infer from this passage, that the Leges were published at a later period than the Capitularia; and some considerable time, indeed, after the age of Charlemagne. From the words, " Si in Ecclesiam confugerit, reddatur," we must conclude, that till that time churches had, either by law or custom, been sanctuaries endowed with the privilege of protecting offenders, even such as had committed capital crimes, and that this prerogative was abolished by the " Leges Saxonum." Even if we waive the manifest contradiction between the two enactments, we must still acknowledge, that the delivering up of offenders who sought an asylum in churches could not possibly be any of Charles's ordinances. " Benche era iniquo ed empio," as the poet makes him confess, he was superlatively catholic. He would have been the last man to have detracted from the sanctity of churches, particularly in Saxony. It is a notorious fact, that the temples of the ancient gods of that, as well as of other northern countries, had enjoyed the privilege of pro-

tecting offenders; and it is quite absurd to suppose that Charles would have issued a law, from which ignorant men might infer that the Christian churches were to be considered less objects of sanctity than Pagan temples had been; nay, he had not the power to do it, for churches were beyond his jurisdiction, and remained inviolate places of refuge for criminals, wherever the authority of the Church of Rome was unimpaired and unmodified.*

But if the "Leges Saxonum" emanated from Denmark, there is nothing surprising in the above-quoted enactment. The Danes were very undutiful sons of the church;—eaters of horse flesh and of meat on forbidden days,—violators of the clerical rules of celibacy,—vilipenders of excommunications and interdicts,—abridgers of ceremonies,—

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* We have no wish to conceal that there are indeed two paragraphs of ecclesiastical law in the Saxon code, Tit. II. § 8. and § 10. These run as follows:—"Qui in ecclesia hominem occiderit, vel aliquid furaverit, vel eam effregerit, vel sciens perjuraverit, capite puniatur.——Qui homini ad ecclesiam vel de ecclesia die festo pergenti, id est, Dominica, Pascha, [Paschate,] Penthecoste, Natali Domini, Sanctæ Mariæ, Sancti Johannis Baptistæ, Sancti Petri, et Sancti Martini, insidias posuerit, eumque occiderit, capite puniatur. Si non occiderit, tamen insidias fecerit, bannum salvat de reliquis." It is quite clear that the words, "Qui in ecclesia hominem occiderit," mean murder or manslaughter committed in a church. In this, then, appears the sanctity of churches in the "Lex Saxonum,"—that it enhances the guilt of crime that is committed there. The same does one's own home by many northern laws; but the church cannot protect a criminal from lawful punishment.

they suited their creed to their convenience,—and as for the thunders of the Vatican, they thought "procul a Jove, procul a fulmine." The Church of Rome connived at many abuses with these hyperboreans, and, no doubt, often said, "quos ego." —The absurdity of allowing malefactors to avail themselves of a sanctuary, had now begun to be felt; and to the Danes there appeared no reason why the temples of the new faith should enjoy the obnoxious prerogative of cheating justice of her victims, any more than their ancient temples, to which this privilege had been denied in the last years of Paganism.

This, then, is the sum of our arguments:—

The *Capitularia* and the *Leges* could not emanate from the same legislator.

Of the Capitularia, Charlemagne was the legislator; *ergo, not of the Leges.*

Again, The *Leges* abrogate an enactment of the *Capitularia;** ergo, the Leges are of later date.

Again, With regard to the Leges, there is only a question of two legislators, Harald of Denmark, and Charlemagne; for none of the ancient chronicles mention any others than these two.

Charlemagne cannot be that legislator; ergo Harald is.

Coroll.—There are enactments in the "Leges Saxonum," which could not possibly be Charlemagne's; but which were more likely to emanate from Harald Bluetooth than any other king.

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* The Propos. Maj. is here a manifest Enthymema.

Having thus established the most important point in the early history of northern law, we shall return to the Juries. But this point was with regard to them, too, of the utmost importance. It is a proposition requiring no proof,—" That no law " can be rightly applied, unless it be rightly under- " stood." Another principle now universally admitted among lawyers, particularly the civilians, is, that it is impossible to understand any law, unless its history, which contains its inductive cause, be fully known. We may rest assured that this maxim is equally true with regard to northern as well as Roman law, and that a perfect knowledge of the latter is not to be presumed, without a familiar acquaintance with its history. A thousand speculations on trial by Jury in its actual state, will never supply so clear a knowledge of its essence as its history can do. We must know how and under what conditions it took its origin, at least how it was practised in the early ages ;—we must know its ruder, primitive forms,—the defects of these, and the remedies which from time to time were discovered for these defects;—we must know also the modifications through which this venerable institution passed, when transplanted from one country to another, and the causes of these modifications ; and these again must be considered in connection with the customs and national character of the countries where trial by Jury was in use.

§ 6.

TRIAL BY JURY ACCORDING TO THE LEGES SAXONUM ET FRISIONUM.

The reason why these are first treated of, is, that even when we acknowledge that Harald Bluetooth was the author of these laws, being a production of the tenth century, they still are one of the most ancient specimens of written laws to be found in Northern Europe. Indeed, they are in all appearance the first sketch of, or attempt at, a written code. Traditionary rules are here reduced to writing in the most compendious manner, as if in a memorandum book. * The

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* We copy a few paragraphs from the beginning of this code, that the reader may, without a reference to a copy,—not everywhere to be met with,—judge of its character.

" In Christi nomine incipit, Legis Saxonum Liber de Vul-
" neribus:

1. " De ictu nobilis XXX Solid. vel si negat, tertia manu
" *juret.*

2. " Livor et tumor LX Solid. vel sexta manu juret.

3. " Si sanguinat, cum CXX Solid. vel cum undecim juret.

4. " Si os paruerit CLXXX Solid. vel cum undecim juret.

5. " Si os fregerit, vel VULITIVAM fecerit, corpus vel coxam,
" vel brachium perforaverit, CCLX Solid. vel cum undecim
" juret.

6. " Si gladio vestem, seu scutum alterius inciderit, XXVI
" Solid. componat, vel tertia manu juret.

7. " Si per capillos alium comprehenderit, CXX Solid. com-
" ponat vel undecima manu juret."

Such is the style and tenor of this body of laws throughout.

greater part is criminal law. The Saxon law has 19 tituli or chapters: 1. De Vulneribus. 2. De Homicidiis. 3. De Conjuratione et Læsa Dominatione. 4. De Furtis. 5. De Vi et Incendiis. 6. De Conjugiis. 7. De Hæredibus et Viduis. 8. De Dote. 9. De Acquisitis. 10. De Raptu Mulierum. 11. De Delictis Servorum. 12. De Damno casu illato. 13. De Animali quod damnum dat. 14. De eo qui Animal læserit. 15. De Traditionibus. 16. De Terra aliena invasa. 17. De Exulibus. 18. De Liti [*i. e.* ejus qui nec nobilis est nec liber] Conjugio. 19. De Solidis, [*i. e.* eo genere nummorum ad quod lites æstimabantur.]

Here we must not expect to find the trial by Jury in a finished form. Here are indeed no precise or clearly defined rules. What we in this code observe concerning Juries, is the following:

The Saxons had no Juries, in the strict and modern sense of the word; they had only Wagers of Law. A man, when accused of a crime, either paid a certain fine, or if he wished to prove his innocence, he provided himself with a certain number of men, who assisted him, while he by oath cleared himself of the crime with which he was charged.

It is not quite clear, from the words used in the "Lex Saxonum," or in the "Lex Frisionum," what or in what manner the Conjuratores were bound to swear. It seems probable that they only swore that they believed the defendant innocent; for that they actually made an affidavit of some

kind along with the defendant, is perfectly evident.

The number of the conjuratores varied according to the greatness of the crime. The fine, in case he could not by this means prove his innocence, varied in the same ratio.

For crimes of the mildest degree, the oath of three was admitted: severer crimes required six conjuratores, and the most atrocious eleven, when the defendant himself was the twelfth; for the Saxons, as well as the other northern nations, required this sacred number.

There were some crimes which were held so eminently atrocious, that no fine was deemed sufficient to expiate them: in these rare cases, no Wager of Law is mentioned, and probably it was not allowed; for these were also crimes of such a nature as easily could have been proved by witnesses. *(See Tit. II.* § 8. *and* § 10.*)*—It is clear that the defendant chose his own Jurors.

The very nature and constitution of these *Wagers of Law*, implies, that in them indeed UNANIMITY was required. The words, "*Undecima* "*manu juret,*" seem to indicate this. Nor could it be otherwise while the defendant chose his Jurors. If these did not agree, it was considered as if he had failed to find the requisite number of Jurors; *i. e.* he had failed to procure that legal proof of his innocence, which was the only one recognized by the law, and consequently he was declared guilty.

There are very few enactments respecting property cases in the Lex Saxonum. Almost the whole code is penal; we cannot therefore easily discern what mode of trial was used in purely civil causes. Offences and injuries were so numerous, so variously modified, and so frequent, that, as most of them were expiated by fines, they may well be considered as a certain *modus adquirendi passivus*, and thus the law respecting them can almost be considered as a law of property with the Saxons; particularly as cases purely and entirely civil did rarely occur. All transfer of property of any amount was commonly preceded or accompanied by some personal injury or other; if not, the law had in those days nothing to do with it, for then it was managed by the agreement of the parties. It was the previous or accompanying personal injury in every transaction that brought it within the pale of the law, and rendered the actors legal parties in a cause.

We find no allusion to judges in the Leges Saxonum; it is also most probable that they employed none, and that the function of a judge was performed by the Jurors, or Conjuratores.

§ 7.

Norwegian Juries.

Which is the older law, the Swedish or the Norwegian?—There are preserved Norwegian

codes of higher antiquity than the most ancient Swedish which we now possess; at the same time, it cannot be doubted that Norway derived the first stock of its present population, as also its first seeds of civilization, from Sweden. The perfect harmony between the laws of both countries is so great, as to leave no doubt of their common origin. Sweden was never conquered by Norway, neither had the latter country, at any time, any considerable influence on the internal affairs of the former. Sweden too, was the country where the Asiatic Odin ultimately settled, and from whence all those arts and improvements which he and his followers introduced, were propagated over the north:—these considerations lead to the conclusion, that the Norwegian laws are of Swedish origin, though such Norwegian codes as we now possess are unquestionably older than the Swedish.

The history of the Norwegian law has, according to the three principal changes or revolutions which the system underwent, been aptly divided into three periods: the first commencing in the reign of King Hakon Athelstane, about the year 940, and ending at the commencement of the second anno 1274, in the reign of King Magnus, surnamed the Emender of Laws, which second period ends again anno 1397, at the union of Calmar. The third period which then commences ought to be extended to the year 1813, when Norway was separated from Denmark, and joined to Sweden. In the last mentioned year, the constitution of Norway

was entirely remodelled, and a legislative assembly formed; since that year, we accordingly have the commencement of a new era in Norwegian jurisprudence. In every one of these periods the trial by Jury has been used more or less, and certainly always prescribed by law. During the first and second period its use was universal; so that hardly a cause of any importance could be decided without it, except during the latter part of the first period, when ordeals were used in some of the most important causes; as for example, in cases of theft and murder, and in cases of contested or doubtful legitimacy or parentage.* In the second period,

* "Grettir said to the king, now, I will clear myself according to the law of the land. The king said, we will not "prevent thee from carrying the hot iron in this cause, if thou "canst in that manner assert thy innocence. To this Grettir "agreed; so he began the customary fasting previous to taking the ordeal. Thus the day approached when the ordeal "was to be performed; then Grettir went to the church with "a vast number of people, there were also bishops and "priests." (See Grettir's Saga, Chap. 39.) This was a trial for Arson against Grettir Asmundson, an Icelander, which took place in Norway in the reign of Olave Haraldson, (St Olave,) a few years before the conquest of England.

In the reign of the same king, Snorri Sturloson mentions that Sigurd Thorlakson, accused of manslaughter, offered to the king the following alternative:—

"I offer to take my trial by Jury according to your own law, "or I will take the ordeal of hot-iron, if you consider that "*in any way more satisfactory*, and you may be present at "the ordeal yourself." This is said with a sneer at the bigotry of King Olave, who probably first introduced in Norway this ecclesiastical mode of trial.

the authority of the Jury was modified, in as much as the judges, then regularly constituted by the crown, acquired greater authority in every judicial proceeding, and being lawyers, by expounding the law, had an influence on the verdict, particularly when the jurors disagreed among themselves. This influence and authority of the judges increas-

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Harald Gilli, returning from Ireland to Norway, had to prove that he was a son of King Magnus Barfoot, (who was killed in battle in Ireland,) by the ordeal in the following manner: "King Sigurd said, that he should walk over hot-iron "bars to prove his parentage,—that was thought a very se- "vere ordeal, as he was to perform it merely to prove his pa- "rentage, and not to assert his right to the crown; yet he "consented to it, and thus was performed the severest ordeal "that ever took place in Norway. Nine red-hot plough "shares were laid down, and he walked over them with his "feet naked led by two bishops; three days after this the or- "deal was tried, and his feet were found unhurt!" (See Snorra Sturlnsonar Heimskringla, Saga Sigurdar Jorsalafara, Chap. 33.) This ordeal was censured even by the Norwegian clergy, as being too severe. But Sigurd wishing to get rid of a claimant to a part of his kingdom, proposed the most severe ordeal he had seen in other countries, (he had travelled much,) and still to no purpose.

Exactly the same ordeal was used in England. "The re- "solution of the synod as reported by the archbishop, was "this: that Emma the Queen mother, should be sentenced "to go on her bare feet over nine plough-shares heated red "hot in the presence of the clergy and the people, in the Ca- "thedral Church of Winchester." (See History of the Trials, p. 3.) Thus in England too, the ordeal co-existed with the trial by Jury, and was often applied in cases of the greatest moment.

ed gradually and imperceptibly during the whole of this period, and still more in the following, after the union with Denmark; so that in the latter part of the seventeenth century, the function of the Jury had become almost nominal, and they were even entirely superseded in many cases which formerly could not have been decided without them. In the 18th and the beginning of the 19th century, the Jury vanished entirely from the courts of law, and existed no where except in the ancient codes, whose regulations respecting them, however, were not formally repealed. But the courts of judicature were so remodelled and reorganized, and the law of procedure so reformed, that adapting a Jury to the new forms was quite out of the question; and the legislators did so manage, that it should appear to the subjects that the privation of a trial by Jury was no loss; they were to think themselves amply compensated by a plurality of learned judges, written pleadings, and a stricter and better regulated law respecting proofs and evidence. These advantages were placed in such a *relief* before the nation, that the abolition of the ancient institution of Juries hardly gave rise to any dissatisfaction, or even to a stifled complaint.

§ 8.

THE CONSTITUTION OF NORWEGIAN JURIES.

The constitution of the Norwegian Jury is nowhere more clearly explained than in King Magnus Lagabœtir's amended Law of Gulathing, B. I. chap. II. and III. This code was published by King Magnus in the year 1274. It was publicly recited in the hearing of the Norwegian deputies, in the assembly of Gulathing *, and sanctioned by them. In having his laws publicly recited, King Magnus complied with an ancient custom; for formerly it had been usual at the opening of every Thing, for the LÖGMANN (the Lawman) to recite the laws of the land, which he knew by heart:

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* Most of our readers will recollect that THING in the Scandinavian countries means an assembly of the deputies of the people. It performed the twofold function of a Parliament, being both legislative and judicial. In the time of King Magnus, the deputies were nominated by an officer of the crown. Formerly, wealth and aristocratical influence, had secured to every Norwegian a seat and vote in these assemblies.

The ancient THING, at the same time, more resembled a House of Lords, and the modern a House of Commons. The influence of the crown was, however, much stronger in the latter, and by the letter of the law, it even was paramount. Yet the character of the Norwegians was at that time so independent, that the crown could not have accomplished a nomination of individuals which the nation disapproved.

the tenacity of memory, and clearness of delivery required for this recital, were the chief qualifications for this high office. "*He could longest repeat the laws*," is a commendation given in ancient histories to the best *Lawmen*. This part of the Lawman's function, was abolished by the law of King Magnus; he had now only to recite the king's written law, to interpret it, and to state what part or passage of the law applied to each particular case.

The nomination of the Jury of Gulathing, was effected in the following manner :—

There were three officers of the crown, of different rank and functions, stiled *Lendrmadr*, (a nobleman who held land of the king,) *Sýslumadr*, (the king's man of business,) and *Armadr*, (the king's commissioner,) who were authorized to nominate a certain number of *Nefndarmen*, (deputies,) from each *Fylki* (district in Norway.) The law gave this authority to *any* of these officers, without stating in which case it was to be exercised by each. Probably the chief responsibility of the nomination lay on the *Lendrmadr*, as he held the highest rank of the three. They nominated for the assembly of Gulathing 139 deputies, and a proportionate number for another similar assembly of Frostathing, for the northern districts of the country. At the opening of the assembly, these officers had to swear an oath respecting the purity of election in the following form :—" I certify, " laying my hand on the holy book, and I appeal to

" God, that I nominated such men for Gulathing as
" I considered most able and discreet, according to
" my conscience; nor did I therefor receive any
" gift or favour."

The THING, or assembly, was held in the island of *Guley*, where there was a sacred place in which the court was held in open air. This place was paled off by staves stuck in the ground, and cords or ropes ran around the pales. These were called *Vebönd*, (the sacred cords,) and the pales *Vestengr*, (holy pales.) The place within, called *Laugretta*, must be so wide that 36 men might sit there. These were the Laugréttomenn or Jury, chosen from among the deputies. The words of the code are as follows:—

" The *Thing* shall last as long as the Lawman
" chooses, and during such a time as he, with the
" consent of the Jury, deems necessary for adjudg-
" ing the causes which there are to be heard.
" The Lawman shall order the holy cords to be
" fastened in Guley, in that place where the court
" is usually held; these must be so wide, as to
" make sufficient room within, for those who are
" chosen Jurors. But their number is three times
" twelve: their nomination must be so managed,
" that some fit men be chosen from every district.
" Those who are chosen to be Jurors, shall, be-
" fore they enter the court, swear an oath after
" the following formula:—

" ' I protest before God, that I shall give such a
" ' vote in every cause, as well on the side of pro-

" ' secutor as defender, as I consider most just in
" ' the sight of God, according to law and my
" ' conscience, and I shall always do the same
" ' whenever I shall be chosen a Juror.' "

" This oath every man swears before he enters
" the court the first time he serves on a Jury, but
" not a second time though he should be chosen."
(See Gulathings L. B. I. chap. 3.)

This code does not state by whom the Jurors were chosen; but when we look to other northern codes where this point is decided, we find that in this respect there are four cases possible.

1. The deputies might choose the Jurors from among their own number.

2. The Lawman might choose them.

3. Or the king's officers—the same who choose the deputies—or lastly,

4. The parties themselves.

It appears most probable, that in Norway the jurors were chosen by the deputies.

It cannot be said of the Norwegian Jury that it was empannelled, but still it was enclosed; and other regulations respecting it bear a considerable analogy to those of the English Jury. We think this analogy so strong as to exclude every doubt of the common origin of the laws respecting Juries in both countries. We shall here insert these regulations as we find them in the code, without further pointing out particular resemblances; if they are as obvious as they appear to us, they will easily be recognized by the British lawyer.

" It is prohibited to every man, who is not " chosen [a Juror] to sit within the sacred cords, " but if he sits down, and does not go out when he " is admonished, he shall pay a fine of half a mark " of silver. Every man must go *fasting* into " court, and make his appearance there while the " sun is in the east, and remain in the court till " noon. The Lawman shall order the great bell " to be rung when he goes with the book, * into " court; that bell must be rung for no other pur- " pose as long as the THING lasts. But if any man " devotes himself to eating and drinking, taking " greater care of that than the court, then he shall " not be allowed to bring his cause, whatever it " may be, before the court that day. No man " must bring any drink into court, neither for sale, " nor in any other way; but if it is brought not- " withstanding, then it shall be confiscated, and it " belongs to the deputies. All who are chosen " Jurors, shall sit in the court during the whole " time aforesaid, unless they have to go out on " necessary errands. But whoever goes out of " the court, outside the sacred cords, without any " necessity, shall pay a fine of two ores of silver. " If those who are outside the sacred cords make " there such noise and disturbance, that the Jury " are prevented from hearing causes, or those " from pleading, who have obtained leave by the " lawman, and the Jury, they shall pay a fine of

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* i. e. The Code.

" an ore silver, when detected and convicted,
" having been previously admonished."

" Those who are chosen to serve on a Jury,
" shall judge according to law of all causes, that
" in a lawful manner, and course, are hither [to
" Gulathing] appealed; as it is prescribed in the
" book [the code], and in every such cause, as one
" man has HANDSELLED * to another before wit-
" nesses, provided these witnesses appear. But in all
" cases that the code does not decide, that is to be
" considered law, which all the *Jurors agree upon.*
" *But if they disagree, the lawman prevails with*
" *those who agree with him;* unless the king, with
" the advice of the most prudent men, shall other-
" wise decide."—*(Gulathings L. B. I. Chap. 3.)*

This passage is clear as to the general resemblance between the Norwegian and the British Jury. Certain parts, however, are not free from ambiguity and doubt; this arises from the circumstance, that judicial and legislative functions were not only performed by the same body, but there was not even any clear distinction between those functions themselves; legislating and judging was an identical act, in cases unprovided for by the code. Hence the Norwegian name of the court *Laugrètta*, of which the literal meaning is *Correction of the Law;* and *Laugrèttumenn* Law-cor-

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* The original says: *leggia heudr sinar samen*, equivalent to another Norse term *handsala*, which I render by the Scottish word *handsel*. The meaning of the original is, *dextrâ datâ causam alicui tradere et committere.*

rection-men.* However, after the promulgation of the code of king Magnus, they acted more rarely as legislators, and some time after that became entirely forensic. The authority formerly enjoyed by them as contrivers of new laws, was by this code transferred to the king and the Lawman. By sharing it with the latter, king Magnus endeavoured to avoid the appearance of assuming an arbitrary power. But if the *Lawman's* authority in his relation to the Jury increased, it was at the same time loaded with a heavier responsibility, and stricter controul from above. He was indeed constituted a supreme judge, and empowered to hear and adjudge causes alone, during that season of the year when the *Thing* did not sit, nor would his sentence be reversed even by the *Thing*, but Magnus reserved the power of reversing it to himself in council. Thus *Magnus the Amender of Laws* did not overlook his own interest in his emendations.† Still he amended with such circumspec-

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* In a similar manner the English courts of Record are both legislative and judicial; only in England it probably is not the verdict of a Jury, but the sentence of a Judge, which establishes a precedent.

† The law respecting appeals from the Lawman's sentence is not without historical interest, and we shall therefore quote it: "If any man appeals from the sentence of the Lawman "to the *Thing*, then the Jury shall enquire into the case with "the greatest diligence; yet, even if all of them find that the "sentence given by the Lawman is not according to law, "they still shall not reverse it; *but they shall write to the king* "*what they think to be justice in that cause;* as also the circum-

tion, as not to excite any jealousy or suspicion at the time, for none of the new or revised codes which he published (and these were many) met with any decided opposition, except the one which he presented to Iceland, which gave a great umbrage to the clergy of that country; and even to the laity, as they were well aware of the superiority of their own ancient code (the Grey Goose.) However, after several obnoxious articles were repealed, that code too was finally received in Iceland.

The character here given of the codes of king Magnus in general, will appear to be perfectly consistent with his particular law respecting Juries disagreeing about the verdict, which was quoted above, a law so remarkably different from all other Scandinavian Laws on this subject, that it materially changes the powers and prerogatives of the chief judicial authorities in the state, by removing nearer to the crown, or transferring to it altogether, that *Judicium litis decisorium*, which formerly

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" stances which they discovered by their enquiry; for no man " dare reverse the Lawman's sentence;—this our code for- " bids—*unless the king himself*, with the consent of prudent " men, sees reason to decide otherwise; *for he is placed above* " the laws." Gulath. Laug. Thingfarar B. chap. ix. This, although in direct contradiction with the king's oath, even as prescribed in the same code, was the secret principle of king Magnus's legislation, or *Lawmending*, as he very modestly called it. It is remarkable that Queen Elizabeth, who adhered to the same maxim as the above, expressed it equally boldly in Latin: " Principes legibus esse solutos verum quidem est." *Letter to Frederick II. King of Denmark.*

was vested in the Jury alone. In the old Saxon Laws, the old Danish and Icelandic Laws, a simple majority of Jurors decide finally and without appeal in all cases; but king Magnus, in the event of a difference of opinion, gives the power of decision to the LAWMAN, along with the minority,—and we may even infer, that if that minority consisted only of two, still their sentence prevailed when supported by the Lawman;—yet reserving to himself, along with his council, the power of reversing their sentence in last resort, and of confirming the sentence of the MAJORITY, if he pleased. In connection with the foregoing passage,* the following Juridical facts are worthy of remark:

1*st*, That by the law there laid down, the Lawman is for the first time constituted a JUDGE; for until then he had only been a *Jurisconsult*, the Jury being judges to all intents and purposes: the Lawman had only been their legal adviser, whom they might consult on any point of law when they pleased; but they were by no means bound to consult him, when they considered themselves adequate to decide a case without his assistance. By the Gulathings Law of king Magnus, he becomes a presiding Judge, with a formidable CASTING VOTE,† as he could decide contrary to the greatest number of the Jurors, provided only a few of them embraced his opinion.

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* Page 50.

† I use this expression here in its original sense: a vote overruling, or *casting any number* of votes.

2d, By this law, it appears, the first successful attempt was made in Norway, at the extending the Judicial authority of the crown, for the Lawman was now a crown officer.

3d, A unanimity of Jurors is not insisted on here, any more than in other Scandinavian Laws. However, their UNANIMOUS verdict only has the power of a final sentence, and in this rare case it seems that the Lawman could not reverse it. This provision was evidently made in order to cover an arbitrary measure by a semblance of moderation, and in order to avoid the unpopularity of depriving Juries of their ancient authority all at once. But king Magnus well knew that unanimity seldom occurred,* and expected that Juries would not be

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* I have been informed by a learned lawyer, that in this country unanimity is by no means uncommon in the verdict of Juries, particularly in criminal cases. Why, in civil cases it is obtained by a kind of legal compulsion. But as to criminal cases, probably the crown lawyers take good care never to bring any case before them, where there is any weakness or deficiency in the evidence;—the proof being clear and incontestable, a Juror would be liable to suspicion of partiality were he to dissent, or (what a Scottish Juror would think equally degrading,) his dissent would seem to indicate a want of common sense. The more independent the Jurors are, the more frequently they will differ in opinion. The British Juror is, by far, less independent even than the Norwegian Juror, under the Gulathings Law. The former is generally well acquainted with the sentiments of the Crown Prosecutor, and with those of several learned Judges, before he gives his verdict, *i. e.* he knows right well the leanings of *learning*, *talent*, and *authority*,—the two former address themselves

able long to maintain their judicial power on such a condition. It was safer and more convenient to make them work their own destruction as it were, than completely to abolish their judicial authority by a more positive law.

4th, By this law the king is virtually constituted a SUPREME JUDGE, not a mere *fountain of mercy*, but a *fountain of justice:* he might enhance the severity of a sentence, as well as mitigate it. The words of the Code are—"*Unless the king, with* "*the advice of the most prudent men, shall other-*"*wise decide.*"

5th, That this reform of the law respecting Juries, was considered by king Magnus as a point of paramount importance, appears from the fact, that in the code which he published for Iceland,* —a country which a few years previously had, of

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to his ambition, the latter to his interest. Do not Jurors dread a reproof from the Bench?—Such was not the case in Norway. There was no Crown Prosecutor—no summing up—no address from the Bench—no telling to the Jury what their verdict ought to be—neither hypothetically nor categorically. The Lawman was indeed, by king Magnus, made a presiding Judge; but he did not occupy the whole province of his new authority in one day. He could not but recollect, that hitherto the Lawman had been a mere Ηγεμων, and he would not attempt at first to prejudge every case that occurred. He knew that eventually the case would come to him,—he needed not go a step to meet it. Authority is not busy or bustling, but quiet like a mandarin; it holds the end of Jove's golden chain with its little finger, while the lower powers ineffectually struggle at the other end—

"πάντες δ' ἐξάπτεσθε θεοὶ, πᾶσαί τε θέαιναι."—IL. Θ. 20.

* The JOHNS BOOK.

its own accord, paid homage to his father *Hacon the Old*,—he introduced the same regulations respecting Juries and their verdict, expressed in the very same terms as in the Gulathings Law.*

6*th*, For the sake of those readers who attend to Norse Etymology, it may not be superfluous to observe, that the term LAUGRETTOMADR is, grammatically speaking, by no means equivalent to the term *Juror*, but juridically these terms are here equivalent. *Laugrettomadr* is a word of three roots, viz. *Laug*, *lex ; retta*, *correctio*, *emendatio ;* and *madr*, *homo ;* the whole term literally means *Law-emendation-man*, or *Law-amendment-man*. Thus, they were denominated from their principal function as it originally was, viz. that of *amending the law*—a function from which king Magnus was most anxious to relieve them, and which he had no objection to take altogether into his own hands.

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* Arnesen, in his "Islandske Rettergaug," p. 228. (*i. e.* Form of Process in Iceland,) justly observes—"This MODE "OF PROOF by means of a Jury was so much changed by the "laws of king Hacon and king Magnus, that the Jury was "hardly to be recognized." Here it is remarkable, that Arnesen himself, a learned Icelander, an eminent antiquary and lawyer, seems to have totally mistaken the nature of the Jury, (whose function he has, however, most accurately described,) representing it as if it had nothing to do but to *prove* a fact. Whereas the truth is, that their verdict had the power of a sentence. But *Arnesen* being himself a provincial Judge, seems to have forgot in this instance the time of which he was writing, and thus he speaks of the Jury according to the theory of modern Danish lawyers, and assigns to it that rank exactly which Judges generally wish it to possess, and no more.

But he was too great a politician to change mere names rashly: he altered rather things than names: his maxim was, Let them dream that they have the thing, while the name is preserved. But besides *law-mending*, the *Laugrettomen* had always done the duty of *Special Jurors*, and this function they still retained under such limitations as are mentioned above. *Laugretta* may also be translated *Law-court*, (retta being then synonymous with the German Gericht,) and Laugrettu-madr, Law-courts-man, or an Assessor in a Court of Law. The law-terminology respecting Juries of the time of king Magnus, may be thus laid down with accuracy:

NEFND is a general term for Juries of every description.*

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* The grammatical sense of the word NEFND is nomination —it being derived from NEFNA, *nominare*, of the root NAFN, *nomen*: the general sense of NEFND is committee,—a number of men nominated or chosen to transact jointly some business, and especially to judge or decide in a cause; hence flows the juridical sense: as a strict law term, it means *a Jury* chosen under certain formalities prescribed by law. But the second signification here mentioned (committee,) also occurs in the ancient codes. Mr Sveinbjornsen, the translator of the Gulathings Law, has not been aware of this, and consequently mistaken the sense of a passage in *Landvarnar Bolk*, (the 3d book of the Gulathings Law,) chap. ix. "Svo skal hann "[Styrimadr] oc gera NEFNDARMÖNNUM eindaga nær their "scolo til scips koma oc eigi thá scipara stefno oc scodi nefnd "vopn oc klædi manna." This he translates as follows:— "Eodem modo classiariis diem navarchus præfiniat quo illi "ad navem se sistent, lustratio fiat, et arma sociorum vesti-

Laugretto-madr is a Juror belonging to that particular Jury which used to adjudge causes in the two Great Things, or Legislative Assemblies of Norway, Gulathing and Frostathing, and which was enclosed within the *sacred cords (vebönd)* in these Assemblies.

7th, The words—"*But in all cases that the Code does not decide, that is to be considered law which all the Jurors agree upon*," might lead a hasty reader to conclude, that this provision had reference to *legislation*, and not to *judicature*: such, however, is not the case. This regulation respects entirely the judicial function of the Jury: this is even manifest from the whole tenor of the passage, as well as from other circumstances. It never occurred to the ancient Scandinavians, that the application of a law could be the least doubtful. In fact, their codes were so framed, that the application of the law was in most cases extremely plain and easy; so special, so much adapted to particular cases, were the regulations of the law; hence the mere application of the written law to each oc-

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" mentaque examinentur." This passage should have been translated as follows: " Diem quoque dicat [gubernator] " *viris selectis quibus rei navalis cura commissa est*, quo ad navem " conveniant; tum et nautæ convenire debent. Illi autem " viri selecti nautarum arma inspiciant atque vestimenta." Sive Anglice: " He shall also summon the [navy] committee " to a certain day, on which they shall visit the ship; on that " day the sailors shall also present themselves, and the com- " mittee shall inspect their arms and apparel."

curring case, was by them hardly considered as a judicial function. But as the law always applied to particular cases, a natural consequence was, that a vast number of cases constantly occurred which were unprovided for by the Code; therefore to adjudge such causes was the same thing as to make a new law, and hence the expression, "*that is to be considered law which all the Jurors agree upon.*"

§ 9.

Further Remarks on the Decay of Trial by Jury in Norway.

All modern nations, (Europeans and Americans at least,) in as far as they dare express their political opinions, though disagreeing on many other points in politics, seem to agree in this; that they consider the *Trial by Jury* as a palladium, which, lost or won, will draw the liberty of the subject along with it.

In the many constitutions which have been projected or established in the nineteenth century, most other things were dissimilar and local; this alone was a vital point, a *punctum saliens*, from which it was expected that the whole fabric of a liberal constitution would be spontaneously developed. I do not think, however, that this particular part of the physiology of the *vita politica* is as yet sufficiently explained, or that it has been satisfactorily

demonstrated, how the liberty of the subject is thus intimately connected with a Trial by Jury. Most authors seem to admit it, or pre-suppose it as a fact, without further enquiry. To investigate or elucidate this point, even if I were able, lies beyond the limits of my present research; but I shall here only observe, that the opinion of those who consider the Trial by Jury of such paramount importance, is strongly supported by the juridical history of Norway. The artifices by which king Magnus endeavoured to weaken or to abolish this institution, shew that he entertained exactly the same opinion respecting it, as theorists of modern times,—that he considered it as a troublesome check on the power and prerogatives of the crown, —that, by weakening the authority of Juries, he expected an accession to his own, at least in two ways; first, by obtaining the selection and appointment of a high functionary, (the Lawman) with a controul over him,—and next, the very important advantage of mitigating, or aggravating, or entirely cancelling, sentences of the Supreme Law Courts, according to his own pleasure. The measures by which he carried his plan into effect, were chiefly these:

1*st*, By enhancing the authority and influence of the Lawman.

2*d*, By rendering the verdict of the Jury nugatory in case of disagreement.

3*d*, By transferring to the *twelf-mens-oaths*, *six-mens-oaths*, *&c.* (*i. e.* to wagers of law,) powers

and authority previously enjoyed and exercised by regular Juries.

It cannot be doubted, that these wagers of law were more *popular*, (in a certain sense of the word,) than the regular Juries. These institutions leaned more to the side of mercy than the Jury, which was far more respectable and independent. The former held out to defendants a hope of escape and discharge from any accusation, well or ill founded; the latter answered far better the ends of justice; they were bound to make themselves acquainted with every circumstance of a cause that came under their cognizance, and from their status in society,—their oaths,—and their responsibility,—they could not be expected to acquit, unless they found the defendant to be innocent. Over the selection of these, the defendant had only a limited influence; in the wager of law he chose a certain number of his own friends, who swore a *juramentum credulitatis* to his innocence, and he was only cast, if he failed to find the requisite number. In other respects there was so much similarity in the outward form of the *nefnds* or *laugrettas*, and the *oaths* or *wagers of law*, that the multitude would hardly observe the difference; and if a discreditable verdict was returned by the latter, it was easy for the Lawman or the Magistrate to throw the blame and the odium of such a transaction on Juries of every description, without distinction or discrimination. Nay more, king Magnus, it seems, levelled the distinction, as much as possible, between Juries and wagers of law, by assimilating the latter to the former to a

certain degree, and making the defendant and prosecutor choose an equal number of Jurors. This *hybrid Jury*, which indeed also occurs in the ancient Law of Gulathing, in use before the time of king Magnus, was by him willingly revived, for most causes that are mentioned in that king's code are referred to their judgment. The Nefnd of king Magnus had almost dwindled down into theory. In the legislative assembly of Gulathing, indeed, and perhaps only there, it appears to have retained its perfect form and dignity. Thus much we may infer from that part of the Gulathings Law which regulates the form of process.* In the particular parts of the code where it is ordered to judge in specified causes, it always appears in a somewhat modified form; now more resembling a wager of law; now a royal committee nominated by a crown officer,—fluctuating between LEVELLISM and absolutism.† In some cases it is expressly ordered, that

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* The Thingfarar Bolkr.

† In MANNHELGE BOLKR, Chap. v. The Judge, i. e. the Lawman or the local Magistrate, is the sole nominator of the Jury: "Ef madr stendr mann med laugligum, vituum á "kono sinui, gialdi hann full manngiauld bóudanum, slik sem "sá er madr til, er kono á ef hann vœri saklaus drepiun. "Enn hálf *mandsgiauld* (l. manngiauld) ef hann stendr mann "á módor sinni eda dóttor eda systor ef thœr eigo eigi bön-"dor sér. Scolo thessi giauld döma tólf menn laugliga tilne-"fndir af rettaranum." i. e. Si quis idoneis præsentibus testibus mœchum deprehenderit stuprum uxori suæ inferentem; mœchus marito integrum *veregildum*, i. e. (legalem compensationem pro cæde ingenui hominis,) pendito, tale, quale mariti dignitati conveniat, et quale pro ipso, si innocens fuerit cæsus,

those who are to decide a case shall not be a regular Jury; and it is remarkable, that in one instance a novel term is made use of, which has a tendency to degrade the Jury, and which places them in a rank with mere witnesses.* But in many cases the terms

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justa esset futura compensatio. Si vero matrem, aut filiam, aut sororem comprimentem deprehenderit sintque illæ nemini junctæ matrimonio, mœchus dimidium pendito *veregildum*. Has compensationes *duodecimviri a judice secundum legem nominati* decernunto. I have not given Mr Sveinbiörnsen's translation of this passage; I consider my own more literal and also more *legal*. I have not hesitated to make use of the barbarous word *veregildum*,—it is a technical term used in the Saxon law, as well as in other ancient Teutonic laws. It is composed of VER, VIR, and GILDI, *pretium, compensatio*.

* Thus, for example, in Mannhelgi-Bolkr, Chap. xi. The passage which I shall quote, treats of MURDER,—a term which in this code denotes every *manslaughter* which the perpetrator does not publicly own, or solemnly publish to be perpetrated by himself. The words of the code are as follows: "But if he "(the slayer) does not publicly own the slaughter, then he is a "downright murderer, and has forfeited his goods and safety. "In case both the slayer's own declaration of manslaughter, "and the statement of the wounded, are given in, before the "first THING, (i. e. court that is held after the perpetration "of the act,) and it is given into court with the formalities afore prescribed, then the statement of the wounded "shall be received, and not the slayer's declaration; yet "he is acquitted of murder, although he may be condemned to banishment. But if the statement of the wounded "is not given in, before the first court, and if there appear "no witness of homeseeking (aggression:) but if the wife of "the slain appears as a present witness, and states her evidence "according to law, supporting it by the testimony of two men "who are free-born and of age, then her evidence shall be

of the code are so vague, as to leave us in doubt whether a regular Jury or a wager of law is meant. This vagueness seems to be studied, in order to leave the greater liberty to the Judge as to the mode of election, or as to the species of Jury he should employ in each particular case.*

§ 10.

We may judge how firmly rivetted to the nationality of the Norwegians, and how deeply rooted in the affections of the people the Trial by Jury was, from the circumstance, that in spite of these overt and insidious attacks from above, it still

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" received, but not the slayer's declaration (víglýsing.) " But the heir of the slain shall repair to that district " (Fylki) or hundred (herat) where the slayer professed " his home to be, and if he finds a man of that name, who " also appears to be a likely person to have committed the " deed, he may indict him. But if the person indicted will " not confess, he must be summoned to a THING, and on " that THING twelve men free-born and of age, shall clear " him, (i. e. by their oaths assert his innocence.) These " are *not* to be JURY-WITNESSES. (Nefndarvitni)." Here we should observe, that in the gravest causes that come before a court,—1*st*, a preference is given to a wager of law,—and, 2*d*, the Jury are called by the degrading term Jury-witnesses.

* The usual expression is *lögliga tilnefndir*, i. e. lawfully nominated. See Mannhelgi Bolk. Chap. xix. § 4. Chap. xxii. § 2. Chap. xxiii. § 1. et passim alibi.

subsisted, in some form or other, during many ages after the time of king Magnus; nay, it has never been totally abolished. Even in the Norwegian code of king Christian V. of Denmark,* we discover some remains of it, although the cases in which it is there employed, are but few. However, these are cases of great moment and importance, as for example, manslaughter, and litigation respecting limits of land.

§ 11.

A Glance at the Antiquity of Swedish History and Institutions in general.

The Swedes have often been so extravagant in their claims to antiquity, that by their high pretensions they have challenged the scepticism of their neighbours against every part of their ancient history. Had their zeal been more moderate, Swedish history would now be more generally known in Europe, and the rich materials contained in Scandinavian literature would have become more available to the Republic of Letters. As it is, by arrogating too much to themselves, they have nearly lost all. At least, English and French writers sneer at their historians,—often, it is true, without knowing any more of them than the ridiculous results of the fanciful lucubrations of some of their

* Published in the year 1683.

modern authors.—Many a quoter knows no more of Burnet, than that he asserted there were men with *tails* in the Nicobar Islands, who saw better during night than in the day-time,—(this he asserted, by the bye, on the authority of Linnæus, but of that the quoters know nothing;) and for this whimsical mistake, the *enlightened* men of *our enlightened age* consider themselves warranted to pass sentence of condemnation against one of the most learned and philosophical works written in the last century. In like manner, many know no more of Swedish history than *Olaus Magnus* and *Rudbeck;* and, indeed, no more of the latter writer, than that he fancied he had proved, that Paradise, (the Atlantica of Plato,) was situated in Sweden. It would be well for Rudbeck if a complete parallel could be drawn between him and Burnet, in other respects; but I am sorry to say, such is not the case. Rudbeck's credulity is excessive—even for Sweden—even for the 17th century.* Rudbeck's learning, more extensive than profound, frequently supplied materials for the most extravagant combinations: in his age etymology was in its earliest infancy, and as yet unbridled by criticism. The learned began to see that language itself was a mine, rich in historical facts. Their enthusiasm at such a discovery carried them beyond the limits of sober judgment. But besides, I think it may

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* His error, too, is essential and fundamental; his work mainly rests on it: Burnet's error was accidental, and of little moment in his work.

be considered as a peculiarity in the Swedish national character, that of all, or nearly all northern nations, they are the least *sceptical.*

Making, however, every possible allowance for these circumstances—deducting every thing that ought to be deducted—the antiquity of Swedish institutions, as founded on well authenticated facts, as supported by unquestionable records, is amply sufficient to satisfy every reasonable claim of the boldest and most patriotic Swedish antiquary. An undoubted historical fact it is,—that Odin was the god of the Swedes, their legislator, their king. Indeed, Odin *has not left himself without witness :* a walk of a few miles through almost any part of Sweden satisfies every discerning inquirer, that here really is Odin's own peculiar domain : Apollo and Athene have no better title to Greece. Here you stumble on a monument, the very shape and form of which makes you doubt whether it was raised by beings of our species. You examine it more closely, and you discover characters unlike every system of characters you ever saw before; yet bearing a faint resemblance to all—somewhat resembling Greek—somewhat Latin—the Tartarian —the Tibet Alphabet—Sanscrit—Hebrew—Phœnician : in short, any thing and nothing.* If you analyze this alphabet, you find it simpler and more scanty than any other, containing, like the Cadmean, only sixteen letters, but in three cases other

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* Confer Dr Bringulfsen's " Periculum Runologicum," Hafn. 1823, 8vo.

elements, and more indispensable ones.* These characters you find arranged in lines and figures, of every imaginable shape, form, and direction: from right to left, and left to right,—upwards, downwards, and obliquely,—in the form of dragons, and serpents, and other beasts. The writing expresses meaning by alphabetic elements,—the figure of the line, an hieroglyphic emblem. The individual characters themselves consist of a simpler combination of lines even than those of the Pali alphabet; every line of which these characters are composed is a straight line. You never saw a system of letters in so many respects answering the idea which you previously might have formed of a parent alphabet. If you have to chuse between the two problems, the deriving it from any other, or all other alphabets from it, you will much more readily undertake the latter. Such is the writing of Odin. But examine the language of those monuments—whether you consider its grammatical form, or its style, its antique character is obvious: —a very intricate system of inflections—a great care and ingenuity displayed in the framing and beautifying of every word—the nicest harmony, proportion, symmetry, between all the elements of which a word is composed—a scrupulous avoidance of all harsh sounds, yet no prevalence of any particular letter permitted, which might create mo-

* The Cadmean has a distinct d and t, g and k, b and p, which the Runic has not; but instead of these, the latter has figures for sounds totally distinct from other sounds in the alphabet; th, h, and final r.

notony or disharmony—these are the external and the truly Indian characteristics of Odin's language. The style is incomparably simple and concise.* Each monument contains only the name of the person whose memory it was destined to perpetuate, and of the one who raised it. There never is a superfluous word. Examine the interior of these tombs! Here, too, you meet with memorials of an ancient religion, ancient customs, ancient laws, to which now no parallel is found nearer than the banks of the Ganges: a rude sepulchral urn containing ashes and burnt bones,—these are the common contents of these ancient sepulchres. Snorri expressly states, that Odin introduced the custom of burning the dead,—that he made it an article in his laws; and that the inhabitants called the age, during which this custom subsisted, *the burning age*. Thus monuments still extant, confirm the truth of the ancient record. Many other objects—local names—popular traditions, and still existing national customs—all bear witness of Odin. There is a consistency and harmony of all its parts, in the record of this god. The same spirit pervades the whole system. As a moralist and legislator, Odin appears the same character as he is represented to be in the narrative part of the Edda, in popular tradition, and in the Sagas. He is every where a god of war, of the liberal and useful arts, of subtilty and stratagem, and withal a supreme god of wisdom, rule,

* How vast a number of these monuments have been found in Sweden, the reader may learn from Verelius, Peringschiold, and Worm.

and order.* The Eddas are records which could not be falsified, and the high antiquity of which is now no longer doubted by any critic.† Of course, their narrative part must be read and understood like any other mythical history.

The succeeding laws of Sweden,—those codes which are still preserved, are all imbued with an Othinic spirit. I speak of laws made and promulgated a thousand years after his day, in the tenth and eleventh centuries, that is, after Christianity had become the established religion of the country.‡ But WHEN DID ODIN LIVE AND LEGISLATE? As this is a starting point in the history of northern jurisprudence, it would be of importance to have this question satisfactorily answered. But I apprehend that we cannot now expect any full, or more satisfactory solution, than that which has already been given by Torfæus.‖ Any attempt at the deter-

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* Once it was a fashion among Antiquaries to derive all mythologies from the Greek. During that period some contended that Othin was Zeus, and others that he was Hermes.

† Sheringham, in his book, "*de Anglorum gentis origine*," has spoken of the authority of the Edda like a most competent Judge, p. 265. Ed. Cantab. 1680.

‡ It is, for example, characteristic of all these laws, how life and limbs are vilipended, and at the same time how severely personal affronts are punished. A certain price is put on particular wounds and mutilations. Females seem to be a kind of personal property of their husbands and relatives. Twelve respectable men adjudge every cause of great moment, and so forth. Every one of these institutions and regulations have an air of Othinism about them.

‖ In his "*Series Regum Daniæ.*" I quote no particular

mining the exact period when Othin settled in Scandinavia, is vain; even Torfæus has perhaps in this point exceeded the limits of sound and philosophical criticism. The mythical periods of the history of mankind do not even require this exactitude. Othin and his followers represent a whole age, and an entire nation. It is enough for our purpose to know, that about the commencement of the Christian era, the religion of Othin was one of some standing in Denmark; thus much seems certain from the scanty allusions of Tacitus. Whether the Othins were one, or two, or three;—whether he was like Lama, perpetuated through many generations;—whether he was a BUDDHA, as Mr Magnusen is inclined to believe;—or even, whether his high priest at Upsala shared his name, and his worship, and dignity;—or whether only one individual Asiatic chief was called by the name of Othin:—these are points of comparatively minor importance to us. This remains certain in every case: The north of Europe has received her culture, as well as the noblest part of her population, directly from Asia, and the name of an individual chief, king, and god, OTHIN, is intimately connected with this event.

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passage; for in a manner it may be said that the whole of the work is devoted to the solution of this problem. However, the reader is more particularly referred to Book II. chap. 2, 3, and 4; and also to Book III. chap. 1, and 2. Torfæus assumes a plurality of OTHINS. According to him, the second, or the Upsala Othin, who is most intimately connected with Scandinavian history, arrived in the North about the year 70 after Christ. See Ser. Reg. p. 113.

§ 12.

A Type of the Jury Trial in Snorra Edda.*

The Prosaic *Edda*, containing the Theogony and Cosmogony of the Scandinavians, is commonly called *Snorra Edda*, or the Edda of Snorri Sturluson, a celebrated Icelandic author and *Lawman*, whose age comprizes most of the latter half of the twelfth, and the earlier half of the thirteenth centuries. He cannot, however, be considered as the author, but only as the collector of a work, the materials to which had been in existence at least a thousand years before his time. The fables which partly had been handed down by tradition, partly preserved in ancient songs, or in various mythical Sagas, he collected into a body, with the view of furnishing the Scandinavian *Scalds* with a kind of text-book, or poetic canon, and also for the purpose of facilitating the reading and understanding of earlier poets. † As the book is entirely mythi-

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* I mean Præfiguration, in German *Vorbild.*

† The doubts which have been started as to *Snorri's* interest in the Prosaic Edda, seem to have arisen from mere hyper-criticism. These doubts seem also now to be set aside by the most sagacious modern critics. With reference to this subject, the reader may, however, consult Prof. Finn Magnusen's Life of Snorri, written in the Danish language; the article *Snorro Sturluson* in the "*Biographie Universelle;*" Rask's preface to his edition of the Snorra Edda, Stockholm, 1818, 8vo. Rask, however, more sceptical than some other authors, is inclined to ascribe only the first part (Gylfaginning) to Snorri. The rest of the book he supposes to be compiled by several authors.

cal, we are not to expect to find here any regulations respecting Juries, as such;—if we find an economy and arrangement in Othin's domestic government, in any degree resembling the judicial institution which latter ages more fully developed, we must be satisfied. The words of the sacred text are as follows:—

"Then said Gángleri,* What did Alfauthr † "do after the building of Asgarth ‡ was finished? "Hár § answered: In the beginning he chose "those who were to join him in the administra- "tion, and requested them to settle along with "him the PRIMITIVE LAWS || of mankind, and con-

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Confer also Depping "Histoire des Expeditions Maritimes des Normands." He speaks of the Edda in the preface to this work. This author seems not altogether to be aware of the existence of two Eddas, although he alludes to both of them. He deserves a particular commendation as a more just estimator of the merit of Snorri Sturluson, than Dr Muller, the present bishop of Sealand. Snorro is the Icelandic name Snorri latinized. In English, and even in French, the Icelandic termination ought to be retained, as being more congenial to these idioms.

* A king of Sweden who had gone to visit the gods, in order to be informed by them about the creation of the world, and its government.

† Alfauthr, i. e. Alfather, one of Othin's names.

‡ Asgarth, the metropolis of the gods.

§ Hár, one of Othin's names.

|| The common acceptation of the term ORLAUG is fates, destinies; but that sense of the word is not admissible here; to settle these was the business of other Deities, viz. the Three Northern Destinies, Urth, Verdaudi, and Skuld. The primary sense of the term ORLAUG is *primitive laws*, Germ. Urge-

" sult with him about the government of the city. " They held their court in a field called *Itha-völlr*, " in the centre of the city. Their first work was " to build a temple where their seats are placed; " *there are twelve of them*, besides the high seat " belonging to Alfauthr. This house is the best " built, and the largest of all that are on earth."* In another place a different court of the gods is mentioned. " Then Gángleri asked: Where is " the chief place, and sanctuary of the gods? Hár " answered: It is under the ash of Ygdrasil; there " the gods hold court of justice every day;"— (here follows a description of the different roots of the Ash, and then the Edda continues:) " The " third root of the Ash is in heaven; below that " root is a well which is very holy, called Urtha's " well; there the gods hold *their court of justice.* " Thither the gods ride every day by the bridge " of BIFRAUST,† which also is called ASBRIDGE."‡ In another place Hár being asked by Gángleri, who those are among the ASES in whom men are bound to BELIEVE, answers: " There *are twelve* " *Ases known to be gods;*" and a little further

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setze, and that acceptation of it gives here the most convenient sense. It was the peculiar province of Othin to lay the foundation of all that existed, or was to exist, in *generation and corruption*, i. e. of all things *worldly*, he had nothing to do with things *permanent* and *eternal.*

* See Snorra Edda, Rask's edition, p. 14.

† The Trembling Bridge, i. e. the Rainbow.

‡ The Bridge of the Asagods. See Edda, p. 17.

on, he mentions the name and peculiar character of each.*

Collecting under one view the information contained in these passages, and comparing it with the Scandinavian Jury, we cannot but observe several points of resemblance between Othin's court of justice, and the legal institution of latter ages. We find here, that Othin presides as a lawman or judge † in a court consisting of *twelve* assessors, counsellors, or jurors; for their functions we must not expect to find accurately defined. Their meeting or court is first held in the *field* of *Itha*,

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* For the benefit of those who may wish to see the words of the original text of the passage which I have quoted, I will here insert them. " Thá mœlti Gángleri: Hvat hafdiz Alfaudr " at thá er görr var Asgardr? Hárr mœlti, í upphafi setti " hann stiórnarmenn, oc beiddi thá at dœma med sér örlaug " manna, oc ráda um skipun borgarinnar; that var thar sem " heitir Ithavöllr í midri borginni. Var that hit fyrsta theirra " verk at gera hof, that er sœti theirra stauda í, 12 aunnor eu " hásœtit that er Allfaudr á. That hús er bezt gert á iördu " oc mest."..... Thá mœlti Gángleri: Hvar er havfudsta- " drinn eda helgistadrinn Godanna? Hàr svarrar. That er " at aski Yggdrasils; thar skulo Gudin eiga dóma sína hvörn " dag..... Thridia rót asksins steudr á himni, oc undir " theirri rót er brunnr sá er miöc er heilagr, er heitir Urthar " brunnr; thar eigu gudin dómstad sinn: hvern dag rída " Æsir thángat upp um Bifraust, hon heitir oc Asbru."..... " Thá mœlti Gángleri: Hverir eru Æsir their er mavnnum er " skyllt at trúa á? Hàr svarrar: Tólf eru Æsir gudkunnigir."

† One of Othin's many names, (I have seen a catalogue of 120,) was *Haufudr*, which denotes an Author, and also an Umpire or Supreme Judge: in the latter acceptation it is used in the " *Hervarar Saga*."

—afterwards they built a temple or court house; but in another place, and where their principal court of justice was held, it seems that they met in open air at Urtha's Well, under that root of Yggdrasil, which was in heaven. In a similar manner, all northern courts were anciently held in open air. The place where Othin held his court, was a sacred place; the fields or enclosures where northern courts were held, were also peculiarly sacred.

§ 13.

It is, however, of far greater importance to us, to consider the Trial by Jury, as we find it described in the ancient codes of that country. The regulations we here find respecting it, are in some instances stricter and more detailed than those of the Norwegian laws. This legal institution has been more fully developed in Sweden, and more generally employed, for trying causes of every description; here, also, it has longer subsisted in full force. In the year 1687, Laurens Welt writes;* "Our hyperboreans (meaning the Swedes) were "in the habit of employing, *and they still do em-* "*ploy Juries,* whose duty formerly was to take "cognizance of the fact, examine [witnesses], and "explain the state of the cause;—all this is mani- "fest from our laws." The Jury is by this author

* See above, page 8. note.

called NÄMBD, and that indeed is its most frequent denomination in the ancient Swedish codes. * He says that there were several species of it; viz. the *Konungz Nämbd*, or King's Jury; the Lawmans, the Bishops, and the Hundreds Jury. Then follows a passage which seems not quite consistent with the one quoted immediately above; but what follows we may, however, consider as the more accurate statement of the two. Thus he continues: "This Jury having fairly considered all "circumstances, was empowered to ABSOLVE AND "CONDEMN by their votes; after such a manner, "however, that if they did not all agree, the vote "of the MAJORITY was decisive. That this custom "is extremely ancient, is apparent from these "words of PLATO:—'But they did not give to "'the king the power of putting any of their kin-"'dred to death, unless more than five of ten "'agreed to the same sentence.'" † And Welt thus continues:—"Thus the majority of ten de-"cided, for ten were anciently their total num-"ber; but at the time of St Olave, their num-

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* The word is sometimes spelled *Nämd*, and sometimes also *Nämnd*.

† The Swedish author has not stated where this passage is to be found in Plato's works; but he alludes to these words of Critias, tom. iii. of Plato's works, Serranus's edition, p. 120. D. Θανάτε δὲ τον Βασιλέα τῶν συγγενῶν μηδενὸς εἶναι κύριον, ἂν μὴ τῶν δέκα τοῖς ὑπερήμισυ δοκῇ. In which passage Plato speaks of the Atlantides. Welt, who extracted this passage from Rudbeck, probably took it for granted, on his authority, that Plato here meant no other nation than the ancient Swedes.

" ber was ELEVEN, * and the decision of the MA-
" JORITY of that number was final, which agrees
" with our law, (see cap. 35. Konungs Balk,
" Landslag): Hwen thesse tolff eller siw aff them
" fälla fore konunge sielfwom eller for them
" hans doom hafwa ă Räffst eller Landzthingom,
" som i Thingmălom skils; the skulo warà fälte,
" &c." i. e. " Whomsoever these *twelve*, or *seven* of them cast, before the king himself, or those who judge as his delegates, in a court of inquisition, or on a *Landzthing*, as is stated in *Thingmal*, (a section of the code so called) † he shall be condemned."

Such was the law of the land in Sweden in the

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* " Their number was eleven" (undecim). If the word undecim is not a misprint for *duodecim*, which seems probable, there would be an inconsistence in this passage, for the *locus* of the law, quoted immediately after, speaks of twelve, and not eleven. Indeed twelve, or the half or one-fourth of that number, or its double, triple, or quadruple, is universally the number of northern Jurors. Even the Scottish fifteen ought not to be considered as simple fifteen, but as twelve, with the addition of one-fourth of twelve; or as twelve, with the addition of THREE, a sacred number; or as twelve, with an addition of an uneven number, by way of ensuring a majority; this addition needed to exceed ONE, because THIRTEEN is an unlucky number. The origin of this addition will be seen under Danish Juries.

† Thingmăla Balk, chap. 35. with the superscription, " *Om Nempd eý ă sämber.*" " Nu kan Nempd ey sämia: Hwem siw " aff Nempd wäria wari warder: Hwem the ey wäria wari " fälder," i. e. " If the Jury disagrees." " Now, if the Jury disagrees, he whom *seven* of the Jury absolve, let him be absolved: he whom they do not absolve, let him be cast."

year 1665; and it had at that period been the law of the land from time immemorial. The first origin of this code, entitled LANDZLAG, is not easily ascertained; but King Christopher of Bavaria, who ruled over the three northern kingdoms, Denmark, Norway, and Sweden, revised and amended it in the year 1442. At that time, King Christopher speaks of it as THE ANCIENT law, "*Vetus Legisterium.*" It was afterwards confirmed by Charles IX. in the year 1608; and this was the last royal confirmation it had received, when that edition was published which I have quoted. *

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* The words to which I allude in King Christopher's confirmation, are as follows:—"Nos igitur requisitionem nobis "factam, tanquam rationalem, jure tam divino quam humano "consonam, judicantes, compilationem præsentem, seu VE-"TERIS LEGISTERII propter temporis variationem correctio-"nem opportunam, auctoritate Regiâ, cum omnibus suis arti-"culis et clausulis, maturâ nostrorum Consiliariorum delibe-"ratione specialiter et generaliter præhabitâ, confirmamus: "volentes ut hac tantum compilatione universi in Regno nos-"tro Sveciæ utantur, in judiciis secularibus, secundumque eam "judicent." It is foreign to my present plan, to enter minutely into the history of this Code; but what there is known concerning it, may be seen in the Preface to "*Sweriges Rikes "Lag gillad och antagen på Riksdagen åhr* 1734. *Tryckt uti "Stockholm* 1746," 4to. Its origin is there shortly stated to be this: that "King Magnus Erichson, in the fourteenth cen-"tury, began, out of the many separate Laws which previ-"ously had existed, and been in use in the several Swedish "provinces, to compile a general Code for the whole king-"dom; but that this was not completely carried into effect, "till a general complaint was made to King Christopher

The verdict of the *majority of Jurors* is also held valid by the DALELAGH. That code says, "The "judge shall choose the Jurors, with the consent "of both parties: he on whose side the MAJORITY "vote, shall gain the cause," (see Dale L. Things B. § 8, 9.) The statute of King Magnus Erichson, of the year 1344, is equally explicit in favour of the MAJORITY: "Whomsoever these TWELVE, "or SEVEN of their number, discharge, he shall "be discharged by us, and our courts: Whoso-"ever is cast by them, shall have forfeited his "hand and head to our penal laws, or incur other "penalties, according to the nature of the case," (see the Statute, § 13.)

The Wästgötalagh evidently declares in favour of the *majority* of Jurors, in Thingmala, Fluck. B. ix. The passage will be quoted elsewhere at large. The *Bjarköärätt* has not expressly provided for the case of disagreement among Jurors; but from chap. xi. § 1. and chap. xiv. § 1. it is most natural to infer that the verdict of the majority was received; for the defendant chose one-

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"about the diversity of Laws in Sweden, which prevailed on "him to have them revised, and put them into that form in "which we now have them." But in spite of the learned author of this preface, it is evident that a general code did exist before the time of Christopher, as we have already seen from that king's letter. There remains yet a vast deal to be done for the history of Swedish jurisprudence. There is plenty of materials for a large and interesting work; and a work which might be of importance to every historian, antiquary, and lawyer of northern Europe.

half of the Jury, and the prosecutor the other half. From a Jury so constituted, the court would hardly expect a unanimous verdict.

Several other Swedish codes, such as the Oestgötalagh, the Sudermannalagh, the Wästmannalagh, the Helsingelagh, and the Gotlandslagh, contain no express provision for the case of dissent among Jurors; but as these are only codes for particular provinces of Sweden, and as their regulations respecting Juries in other instances, perfectly agree with those of the Landzlagh,—so much so, that they often use the very same expressions as that code;—and moreover, as none of these codes ever require a unanimous verdict from regular Jurors, but often constitute Juries after such a manner that a unanimous verdict was hardly possible, it is most probable, nay, almost certain, that when cases of disagreement occurred, the practice in these respective provinces, was to follow the rule of the Landzlagh, it being a universal code for the whole of Sweden. It is true, however, that wager of law seems to have been more extensively used in some of these provinces than in others, and that the Jury was accordingly restricted to fewer cases, than there are assigned to it under the Landzlagh; but that circumstance does by no means countenance the opinion, that the law respecting Juries of these provincial codes, essentially differed from the prescriptions of the Landzlagh. On the contrary, the

reasons here stated, as well as the practice of neighbouring nations, render it almost certain that the courts received the verdict of the MAJORITY OF JURORS.

The main object of this treatise being to shew in what esteem the verdict of the MAJORITY of Juries was held by ancient nations with whom this legal institution was in use, and what expedients were resorted to when Jurors disagreed, I have thus separately stated what, on the authority of EIGHTEEN SWEDISH CODES, I find to have been, during many ages, the universal practice in Sweden; a country which, with some reason, lays higher claims to antiquity for its institutions in general, than it would admit from neighbouring nations.

I have shewn a direct evidence in favour of the MAJORITY, from the principal code of Sweden, as well as from some of the oldest provincial codes. The indirect evidence of the other provincial codes of that country is nearly as strong. The total silence on a point of such paramount importance,—every day obtruding itself on the attention of the courts, is, I think, only to be accounted for, by its being thought unnecessary to lay down any specific law on the subject, as ancient custom, and the law of the land, had long sanctioned the validity of the *majority's* verdict.

It seems apparent from many circumstances, that Juries were more independent in Sweden than in Norway; or at least, that they longer retained their high character and dignity in the for-

mer country than in the latter. As this point may not be devoid of some interest to the British Jurist, I shall somewhat more fully consider the nature and constitution of the Swedish Jury.

§14.

In all the Scandinavian countries, the Lawman and the Jury stood in such a close relation to one another, that we never can fully know the power and prerogatives of the one of these parties, without being well acquainted with those of the other. We invariably find, that the more the authority of the Lawman was enhanced, the more the power of the Jurors was weakened, and their dignity lowered. In the same ratio as he was raised to the rank of a real judge, the Jurors lost that rank. In the earliest times, he was a mere *interpres legis*, or rather Ἡγεμὼν των δικαστήριων, and then the Jurors were judges to all intents and purposes; but as the crown power and interest grew stronger, the function of administering, applying, and even completing the law, *i. e.* adding to it new provisions where these were required, was gradually appropriated by him, and taken out of the hands of the Jurors, in whom this power formerly was vested. While republican forms prevailed, his authority, his dignity, and even his emoluments, were considerable: there was hardly to be found his superior in the state; but still he was entirely dependent on the Thingmen (deputies of the legislative assembly) in his judgments; and on the Jurors, as a select body or

committee of the Thingmen; or rather, the judgment was theirs, and not his. Such, for example, was the case in Iceland, as will be seen hereafter. It is interesting to compare the constitution of Norwegian, Swedish, and Icelandic courts, during the 11th, 12th, and 13th centuries, with reference to this matter. In the first of these countries, we find the Lawman's power and influence strongest; in the last, the Jury have, for the longest time, retained their authority unimpaired; and in Sweden, a sort of equilibrium was preserved in the distribution of power between Lawman and Jurors: yet here, too, we observe that all legal enactments have a *tendency* towards the degradation of Juries, and the exaltation of Lawmen. For here, as every where, the Lawman became the crown's chief instrument for gradually removing, mystifying, and paralyzing the Juries, which kings and crown lawyers considered as anti-monarchical in their spirit and tendency.

When we wish to form a right estimate of the respective powers of Lawmen and Juries in the northern countries, and their relative position to one another, we ought particularly to observe,

1. The circumstances and ceremonies attending on their election.

2. The qualifications which rendered them eligible.

3. The parties who elected them.

4. The official oath which they swore when elected; and,

5. The validity of their sentence or verdict; and

to what tribunal an appeal lay from their decision, where there was any appeal at all.

§ 15.

The Swedish Lawman.

We will first consider the Swedish Lawman.—With reference to him, we find the first four points determined in the Landslag, (the code quoted above), Thingmala Balk, chap. 1.; and the fifth in the same Balk, chap. 39. The words of the code are as follows:—"When a Lawman is to be "chosen, the bishop is to make it publicly known, "within that Laghsagha,* eight weeks before, "that all who dwell within that jurisdiction may "come to the Landsthing. The bishop is to take "two clergymen thither along with him. Then "the people are to choose six courtiers (nobles), "and six countrymen. These twelve, along with "the clergymen, are to choose *three* dwelling "within that jurisdiction, whom they consider "most fit, as they will answer to God and their "conscience. Of these three, the king chooses "one whom God suggests to his mind, and whom "he conceives to be a useful man to the people. "He whom the king elects to be a Lawman, shall "swear as follows:—'So help me God, and the "'holy things I hold in my hand, as I, towards "'rich and poor, in my whole jurisdiction (Lagh-

* Where the office is vacant.—*Laghsagha*, a Lawman's jurisdiction; *Lawmanrie*.

" ' sagha), in all my judgments, shall follow jus-
" ' tice, and shun injustice, which is against my
" ' conscience and the laws. Never shall I wring
" ' or twist the laws, or aid injustice, moved by
" ' fear, pelf, or covetousness, envy, ill-will, con-
" ' sanguinity, or friendship. So help me God,
" ' as I keep this oath.' " *

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* It is not stated in the Gulathings' Law of King Magnus, how or by whom the nomination or election of the Norwegian Lawman was made; but it seems pretty apparent, from many circumstances, that he was chosen directly by the king himself, without referring the matter in any way to the people or their deputies. The Norwegian Lawman's oath, however, we find in Gulath. L. Kristind. Balk; and in order that the reader may draw a parallel between the obligation of the Swedish and the Norwegian Lawman, I will here insert it:—
" Now the LAWMEN are to swear the following oath, when-
" ever such shall be the king's pleasure: ' I lay my hand on
" ' holy things, and I call God to witness, that I will be loyal
" ' and faithful to my Lord, Norway's King. I will lay
" ' down such laws to those whom my Lord the King orders
" ' in my jurisdiction, as were first authorized by King St.
" ' Olave, and since have been agreed upon between his law-
" ' ful successors and the inhabitants of this country. But
" ' wheresoever the Law-book (the code) does not distinctly
" ' decide, I shall judge every man's cause as I will answer to
" ' God on the day of judgment, and as I shall find to be just
" ' in my conscience; and yet taking the advice of the most
" ' prudent men who shall then be present: this I shall do to
" ' rich and to poor, to young and to old, to the guilty and
" ' the innocent. May God be gracious to me as I tell the
" ' truth; wroth, if I lie.' " In terms, this oath is in some respects more republican than the Swedish Lawman's oath; but far less so in spirit. Here, indeed, the Lawman declares that he will lay down *the law*, or *tell the law*, where the Swedish Lawman speaks of his *judgments*; but in that part of the code already

Here it will be observed, that out of fifteen electors, the nine were in common cases under crown influence; for though the clergy in some instances voted against the interest and wishes of the crown, yet in ordinary cases these two powers were leagued together; and as three were offered to the king's immediate and uncontrolled choice, he had a fair chance of obtaining a Lawman suitable to his interests. Yet it is obvious that, in the forms at least, a considerable deference is paid to the people's vote. *

As to the fifth point: we find that from the Lawman's sentence, an appeal lay to *the king*, or to those *who judged under the king's commission.*†

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quoted, where his power is more strictly defined, we find that it extends much farther than to the *telling* of the law. The Swedish Lawman, speaking of judgments, only means judgments between terms or THINGS; for when the Thing did not sit, he certainly was a judge in Sweden as well as in Norway. But we nd the Norwegian Lawman endowed with a material power, which was quite new, and which the Swedish Lawman has not; viz. to judge *as he would answer to God*, in all cases "*where the code did not clearly decide.*" Only a crown judge, and not a constitutional judge, could be invested with such a power.

* Formerly the people had had a far more direct influence in the choice of a *Lawman*; this we may infer from the following words in the Westgötha Lagh. "The Lawman shall be the "son of a country gentleman (Bonde). All the country gen- "tlemen have, by God's mercy, the power of choosing him." The words of the original are here somewhat vague and ambiguous; "*thy skula alle Bönder waldä medh Gusz miskun.*" See Thingm. Balk. 1st *Flukk*, i. e. chapter.

† The Code says, "*eller the hans doom hafwa*,"—literally,

§ 16.

The Swedish Jury.

The constitution, the authority, and the function of the Swedish Jury, we find in the Landslagh, Konungs Balk, * not indeed so clearly expressed in all points as we could wish, but wherever this code may be defective, we shall endeavour to supply the deficiency from other ancient Swedish codes. Let us here only observe, that the Jury spoken of in the passage which I shall quote, is that particular species, which, in Swedish laws, is called *Konungs Nämnd*, or the King's Jury, *i. e.* a Jury constituting a court of appeal. "Now, offences may happen to "be committed against the king, and the law laid "down in the KING'S BALK; therefore there shall "be TWELVE MEN ordered in every Lawman's ju- "risdiction, agreed upon, chosen, and nominated "by the *king and the natives of this country.* "They shall attentively and diligently seek out "and discover, each in that district in which he is "ordered to maintain justice, all those that, contrary "to this law, disturb or molest the people: And "they have to swear the following oath, by God "and things holy, and on their worldly honour,

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"or to those who have his judgment," *i. e.* his authority to judge. Not so in Norway; there the appeal lay directly to the king in person, without any modification or reserve. See the passage quoted before, p. 52.

* Chap. 35.

" thus saying,—' So may God help us, and these
" ' holy things we hold in our hands, as we shall
" ' not make any man guilty who is innocent, nor
" ' make any man innocent who is guilty, accord-
" ' ing to that conscience and understanding which
" ' God has given us; nor shall we be prevailed
" ' on by relationship, affinity, fear, friendship, or
" ' favour: and we oblige ourselves to keep invio-
" ' late all the preceding *articulos*, and such as
" ' follow hereafter in this Balk, according to the
" ' law now stated. So may God help us, and
" ' the holy things we hold in our hands.' Whom-
" soever these twelve, OR SEVEN of their number,
" cast before the king himself, or those who judge
" under his commission in a court of inquisition,
" or on a *Landsthing*, as is stated in the *Thing-*
" *mal* (section of the code), let him be cast, and
" lose his hand, head, life, and goods, or money,
" to the king, or the prosecutor and the district,
" according to the nature of the offence. Whom-
" soever they discharge, let him be discharged.
" Against this Jury THERE IS NO APPEAL."*

The words, " They shall attentively and dili-
" gently seek out and discover," &c. might suggest to the reader the notion that this King's Jury, or Nämnd, were not a real Jury, but rather a kind of officers or commissioners of the peace, or even a sort of public prosecutors; such, however, is not the case. They were Jurors to all intents

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* In Norway there was no Jury invested with such a power.

and purposes, and to them lay an appeal from the inferior Juries, they having to adjudge in last resort all causes, before decided by the former. We learn from the Thingmala Balk, * that the gradation was this: from the Hundreds Jury, an appeal lay to the Lawman's Jury; and from the latter to the King's Jury, which decided finally without any further appeal.

The mode of election, *i. e.* how the king and the people concurred in the nomination of Jurors, is not stated in the passage here quoted. Perhaps we may in this place refer to the Oestgötha Lagh† by way of illustration. "Now, if the king will "visit his Räfst,‡ the magistrate of the district "has to appoint a Jury, and both the contending "parties are to be present, and *approve of those* "who are nominated in the Jury. True men§ "are to sit on a Jury, and not parties in the "cause, nor their friends or relatives." From the Westgothalagh it might appear, that the king chose the Jury alone. This code says: "*Konunger* "*skal Nämd fyir sik sätia,*"‖ *i. e.* "the king has

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* Chap. 37.

† Räfstabalk, Chap. 1.

‡ Swedish lawyers translate this term by Judicium Inquisitorium. I am inclined to call it a THING, (a term with which the reader now must be familiar,) in which criminal causes are heard.

§ *Sanninda män:* this term, which is pure Icelandic, literally means *men of truth;* here I think it may be rendered *impartial men.*

‖ Thingmalab. 1st Flukk.

" to appoint a Jury for himself:" but as this code is otherwise very popular in its spirit, and even gives the choice of the lawman to the country gentlemen, (see above, § 15,) this assumption is hardly admissible, and probably, though the code does not expressly state it, the parties had here also the power of challenging the Jury nominated by the king or his officers.

§ 17.

As to the qualifications of Jurors, something is said in the *Landzlagh*, * but a few points more, re-

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* Thingm. Balk, chap. 41. " In these RÆTTARA THINGS," (Periodical Courts of Appeal,) " the magistrate of the dis- " trict shall nominate a Jury,—twelve men from the district; " one half of that number courtiers (nobles,) and the other " half country gentlemen and farmers; good men being house- " holders, [or having a fixed residence. The words in the " text are—GODHA BOLFASTA MÆN,] of whom the parties in " the cause, and the inhabitants of the district, approve. Men " of truth he is to choose on a Jury, and not men of false- " hood, not such as are parties in the cause, or in any way " disposed to favour either of the parties. The magistrate " himself shall be in this Jury, [*Häradz höffdinage skal siel- " fwer i the nempd wara,*] and not another in his stead; unless " he has a lawful cause of absence. If this Jury cast a man, " let their decision stand, and not be revoked. No man dare " appeal from this Jury. (N. B. This is the king's Jury.) " The king may, however, investigate the truth in all causes. " He may repel all *false prosecutions* (SKROKSOKNIR,—the Swe- " dish editor has not understood this term,) and all violent " prosecutions. But the *lawman* shall administer the law.

lative to this subject we find in the other Swedish codes: as, for example, in the Westgöthalagh, * *1st*, That no servant must be a Juror, unless he be so with the consent of the country gentlemen, and the magistrate of the district; *2d*, That they were to be men having a fixed residence, *Bolfasta män*; *3d*, That none must obtrude himself to be a Juryman, but if he did, he was subject to a heavy fine. We have seen before that the Jurors must be impartial men, and not friends or relatives of the parties in the cause. † In several codes it is stated, that the poor, *i. e.* those who were alimented at public expense, could not be Jurors; *6th*, What hardly needed to be mentioned, that outlaws can neither be Jurors, nor even admitted to swear in a wager of law. *7th*, It is doubtful whether women could be Jurors, or even whether in a wager of law their oath was admissible. These determinations, along with some others, as, for example, that the Jurors must be of a certain age, are common to all Juries in the northern countries.

§ 18.

In case of absence, the Swedish Jurors were subjected to a heavy fine: this we learn from the Oest-

* Thingm. B. Flukk 2d.

† We do also find that the parties were permitted to challenge the Jury, when they supposed that any of their number was disposed to favour the other party. See Landzlagh Thingm. B. Chap. 36.

göthalagh.* "If a man remains at home [when "nominated] and does not appear at the king's "RÆFST, he shall pay a fine of three merks, † un- "less he shews a lawful cause for his absence, "such as being sick, or that he has to attend an- "other who is sick, or save his property from im- "minent danger. In these cases he shall prove "by the oath of fourteen men, that he had a law- "ful cause of absence." A similar rule we find in several other Swedish codes.

§ 19.

It seems that causes of every description were tried by the Swedish Juries, although I do not find this any where expressly stated, and although the circumstance, that appeals, (as certainly is the case, see Landzlagh Thingm. B. chap. 37, 38, and 39,) lie differently from a magistrate, and from a Jury,‡ may seem to militate against this position; for it is certain that no *Thing*, *i. e.* court, could be constituted in Sweden without a *nämd*.—

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* Räfstabalk, Flukk 1st.

† From this we may also infer, that in Sweden, (as well as in Denmark, where it certainly was the case,) some degree of wealth was a necessary qualification in a Juryman.

‡ It is already stated in § 16, how appeals lay from the Juries; but from an inferior magistrate, the appeal always lies to his superior; from the Hundreds magistrate to the lawman, and from the lawman to the king.

That in almost every Swedish code,* that section which treats of process, contains detailed regulations respecting it.—That we find important property cases,† as well as criminal cases of every description, referred to their judgment in almost every part of the Landzlagh ;—and that the most important causes of every kind ultimately came before the King's Jury on the Landsthing. Therefore, if there is at all any limitation in the Jury's authority to judge, it can only amount to this ; that less important cases which occurred between terms, were adjudged by the magistrate or the lawman, while all causes of greater moment, and such as occurred about the time when a THING was to be held, were reserved for the cognizance of the Jury. We find that when any weighty cause occurred, the magistrate had to summon a Thing instantly, and not wait for the regular return of the term ; when the Thing had met, his first business always was to nominate the Jury ; and thus it appears that the Jury was the most indispensable and essential party in every court that was held. Indeed, the cases which the Swedish codes have left to the sole authority of the Judge, whether a magistrate or a lawman, seem to be so few and unimportant, that we are tempted to believe that the legislators, or rather the compilers of the codes, who acted under crown influence, were anxious at least to establish

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* I have eighteen of them before me.

† Landzlagh, Bygningabalk, Chap. 33, § 1. Chap. 36. § 4, Chap. 41. § 1.

a theory which as yet they dared not put into practice;—they wished, by occasionally alluding to the magistrate and lawman in the codes, as Judges without an assisting Jury, to habituate the people to the *idea* of Judges without Jurors; although, when entering on particular cases, they ventured not to assign any case of great importance to their uncontrolled judgment. The cases which they judged between terms must have been very few indeed, as we find in the Landzlagh that a Hundreds Thing was to be held once in every week; * and in the same code, that when grievous offences were committed, the magistrate had to summon an extraordinary THING instantly: † and thus the separate lines of appeal; the one being from magistrate to lawman, and from lawman to king; the other from Hundred's Jury to Lawman's Jury, and from Lawman's Jury to King's Jury,—do almost dwindle down into a mere legal theory, as every graver case that occurred certainly had to pass through the Juries. It is barely possible, but not likely, that if both parties chose to commit the management of the cause to a single Judge, rather than to the Jury, the option may have been left them in such a case; but how rarely would such a case occur?

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* Thingm. B. Chap. 6.

† Edzöris Balk, Chap. 22.

ANNOTATION.

I will here subjoin a very few *loca legis*, shewing what causes were decided by the Swedish Juries. I shall take an example from the Edzöris Balk of Landslagh. This section of the code treats of offences against the king's peace, in Swedish called Edzöre or Edsöre, a term which literally means OATH-SWEARING, *i. e.* that oath which the king swears at his coronation to maintain peace in his dominions. The term EDZÖRE is somewhat vague, and of a very comprehensive signification in the Swedish codes, for it both means the king's peace itself, *i. e.* that peace he has sworn to maintain; and also the vast variety of offences committed against it; for there are many offences, in other laws, not at all considered to be of the class of *crimina læsæ*, which in Swedish laws are brought under the class of *Edzöri*.

" When the king's peace is broken, the prosecutor, [or " rather he to whom the prosecution of the cause belongs,— " it is difficult adequately to express the Swedish term MAL- " SÆGHANDEN,] shall make it known in that parish, or within " that *Thing-Jurisdiction*, where the deed was committed, or " even to the king. The deed being thus made publicly " known to the magistrate of the district, he shall immediately " issue summons and convoke a *Hundredsthing*. The Jury " of that district shall investigate and ascertain the truth in " that cause. If there be witnesses, let them appear before " the Jury, and let each man swear the oath prescribed to " him: and the magistrate of the district shall dictate the " oath." Edzöris Balk, chap. 22.

" The Hundreds Jury shall, on that same Thing, or on " the next following, either discharge or cast the accused, " first of all with reference to the king's peace. (EDZÖRIT.) " If they discharge him from breach of the king's peace, he " is innocent of that crime, and then the prosecutor has to " bring an action against him for his offences, conformably " with our law, according to their peculiar character." Edz. B. chap. 23.

Rape is treated of in this same Balk. Here the same crime under different circumstances, seems to come under the cognizance of the magistrate, and under that of the Jury:

"If a man ravishes a woman,—is caught in the act,—" and twelve men prove the fact by their evidence, then " the magistrate shall instantly issue circulars, and summon " a Thing, and sentence him to be executed by the sword " without delay. But if he is not caught in the act, but the " woman states that he has violently accomplished his evil " desire, or that he has wrestled with her without being able " to accomplish his will: if his or her clothes are torn, or if " they are blue or bloody, or if cries have been heard, then " the Jury of the district must investigate the matter. If " they cast the accused, he has broken the king's peace." Edz. B chap. 12. It will be observed, that the latter case is much more likely to occur than the former. The evidence of twelve men renders the former almost impossible. But although the Jury is not mentioned in the former case, as a Thing has been summoned, it must be understood to be present, as we have seen that a Thing is not possible without it. The main object of the peculiar law we have here before us, seems to be expedition: it was thought necessary to punish so heinous a crime, when thus satisfactorily proved in a summary way: and as it might easily happen that the twelve Jurors could not all be present at so short a notice, an extraordinary power is granted to the magistrate: and perhaps in this case the *twelve witnesses* are considered as *Jurors extraordinary*: the number seems to indicate this, and we know that they had to give their evidence on oath. Again, where the case was not so clearly proved, or where it could only be proved by circumstantial evidence, we find the regular Jury expressly ordered to investigate the matter. If they were superseded in the former case, it can only be because there was nothing for them to investigate; the fact being clearly proved without their assistance.

We have seen from chap. 22, that all cases of *Edzöre* regularly come under the cognizance of the Jury. Such cases are stated to be *Homeseeking*, (Sv. *Hemsokn*, Scotice *Hamesucken*,)

revenge, assault on a person going to church or from church, cutting and maiming, rape, bringing a person violently from his home, fettering without legal sentence, castrating, toothbreaking, blinding, cutting off nose or tongue, robbery, piracy, &c. In a like manner, we find in the other *Balks* (sections) of the code, that all important cases are referred to the Jury, as murder, infanticide ; (and it is remarkable that the code expressly states in this place, that it makes no difference whether the murdered child was heathen or Christian,—a specification which indicates the antiquity of this law ;) suicide, bigamy, witchcraft, sedition, rebellion, arson, bestiality, (see Höghmälis Balk.) Likewise the various cases of wilful manslaughter, (not murder,—" *Drăpmăăl medh Wilia,*" are the words of the code,) with a vast number of cases arising out of it ; and the compensations and damages to be paid by the defendant in these cases, were decided by the Jury. Cases of theft, which are treated in a separate Balk, the Tiufwa Balk, (i. e. the thiefsbalk,) seem to be more commonly referred to *a wager of* law, than to a Jury. They are, however, adjudged on a Thing, where a Jury must be present. Also property cases seem in the *Landzlagh* to be more frequently referred to a wager of law, than to a regular Jury. But in the *Uplandzlagh,* for example, in the *Ærfdabalk,* (section of inheritance,) important property cases are referred either to a regular, or an extraordinary Jury. Prosecutions were, however, often so violent, that simple property cases rarely occur, and thus most of them ultimately come under the cognizance of the Jury, in the shape and form of a criminal case, or under the suspicion of a crime being committed. Uplandzlagh Ærfdabalk, Chap. 25. § 2.

§ 20.

For the purpose of ascertaining and establishing the truth or falsehood of an alleged fact, and consequently subjecting one of the parties in a cause

to fine or punishment, we find that the Swedes, as well as other northern nations, the English inclusive, very frequently had recourse to a very ancient institution different from the regular Jury, and yet in some points resembling it. This institution,—*the wager of law*,—by the Swedes called *Edh*, *i. e.* oath, and according to the number of its members, oath of six, twelve, eighteen, three dozen, or four dozen, we observe to have been employed in causes of every description, almost as frequently as the regular Jury; and it seems, that it often depended on the option of one of the parties, particularly the defendant, whether the latter or the former was to be employed; and that when he could obtain a sufficient number of conjurators for the wager of law, he generally preferred that mode of trial. This frequency of its employment, and its esteem and conclusiveness in the northern courts, nearly parallel to that of the regular Juries; and lastly, the circumstance, that the wager of law was not only in frequent use in Great Britain in former times, *but even, that a condition originally peculiar to it*, THE UNANIMITY, *has been, as it seems by mistake, adapted to, and identified with the regular Jury*, particularly recommends it to our attention. In speaking of the Danish Jurors, I shall have occasion to recur to this subject: here I will only observe, that it is impossible to understand a vast number of passages in the ancient codes of Sweden, without knowing the distinction between Juries and wagers of law. In some instances, the terms

of the codes are so vague, that it is difficult to know, whether in a given passage the regular Juries are meant, or a wager of law. I could mention learned lawyers who have overlooked the distinction. Koefod Ancher is perhaps the only author who has put this point in its proper light.

In the Swedish laws, I can find no passage that more strikingly shews the difference between wagers of law and Juries, than the one in the Westgöthalag, * which I shall insert in this place :

> " Of twelve men's oaths how they shall be taken ;
> Of errors in oaths, and their revocation."

" In all twelve men's oaths there shall be wit-
" nesses ; two men shall give evidence, and then
" swear along with the other members of the OATH :
" they cannot be rejected. Neither a minor, nor
" a thrall, nor an outlaw, can be members of an
" oath : if any such is in an oath, then it shall not
" be held to be a lawful oath. If a man makes
" his own tenant a member of an oath, then he
" shall pay a fine ; but the tenant shall fast. † All
" oaths which have been sworn by twice twelve
" men with witnesses, and in a hundreds court, shall
" be valid, and they shall not be rejected, unless
" other two dozen of men maintain a contrary
" statement in the same cause. *Then some men*
" *of* THE JURY *must decide.* The following *oaths*
" shall be decided upon, by *seven* men of THE JURY :

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* Thing. B. Fluck ix.

† i. e. Do penance by fasting.

" *Twice sworn oaths;* * oaths by which a man " disproves his being a child's father; oaths prov- " ing that a person was *born at home,*† shall also be " decided by seven men of the Jury: the last kind " of oaths shall be received for none who does not " walk on his feet:—if an oath be sworn against " the Jury, by those whom it casts, that too must " be decided by seven men of the Jury. If money " is paid in the presence of a broker and witnesses, " and a person afterwards denies it by an oath, " that point must also be decided by seven men of " the Jury: If one has by an oath cleared him- " self of a thief's cause, ‡ and is afterwards found

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* *Twăsöris Edher, i. e.* When a man has been a member of an oath of twelve or twenty-four men, which oath was packed to prove a fact, and when he afterwards has become a member of another oath, which has to prove the contrary. Thus, at least, I understand the word. This error does not necessarily imply wilful perjury; but mere stupidity, or imprudence, or ignorance might be the cause; whereas, with the exception of the two witnesses, which were required in each OATH, the rest of the members were not expected, even in law, to be acquainted, at least not minutely acquainted, with the fact, they only swore a *Juramentum credulitatis,* that they believed the statement of the party, and the witnesses along with whom they swore. Now, they might be so weak as to *believe* the contrary afterwards, and thus they perhaps were induced to swear: not to mention a variety of law-quibbles, by which those who were interested might endeavour to persuade them, that what they were required to swear the second time, was not indeed contrary to their former *oath.*

† Hemfödo Edher.

‡ This is obscure: but the meaning is,—that when one has by a wager of law cleared himself of the participation in a

" in company with the thief, seven men of the " Jury have to decide on that point: If one de- " fends himself in a cause by a wager of law, and " yet afterwards pays a fine or compensation to " the prosecutor, seven men of the Jury must de- " cide. All these wagers of law are revocable, or " the Jury must confirm them. Whenever one " of the parties act against the sentence of an ad- " judged case, twelve men's oaths are required " with two witnesses, and the witnesses must " again swear along with the other members of " the oath; unless they do, they shall pay a fine " of three times sixteen *ortoghs*. Of all revoked " wagers of law, * the bishop takes three *marks* " of the foreman, and the king one mark of every " conjurator; † and likewise if two dozen swear, " the bishop takes three marks of the foreman, " and the king one mark of each conjurator."

From the chapter here quoted, it clearly appears that the northern legislators had only a limited confidence in the wagers of law, and that they gave a decided preference, in theory at least, as they well deserved, to the regular Juries. But

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theft, and is afterwards found in the thief's company, the case must then be tried anew, not by a new wager of law, but by the Jury, of whom seven men are required to establish the guilt or innocence of the party who thus rendered himself liable to suspicion.

* i. e. When the wager of law consists of only one dozen.

† "*Istadha manni:*" A definition is given above of the word Istadaman,—a better definition is, *qui in Judicio stat, vel qui in jurejurando stat.*

men's theories are always better than their practice, and so it appears to have been in this instance. Looking at the practice of the Scandinavian courts, we find in the *sagas* the oaths (the wagers of law) more frequently mentioned than the Juries, although the codes, the Swedish codes at least, speak much more, and more emphatically, of the latter than the former.

Two mighty interests have always been leagued against the Juries in every state: or rather they have each separately, acting from different motives, been inclined to undermine its authority. I mean *crown power* and *law learning*. Whatever some learned Judges may say in commendation of Juries in their books, it would be difficult to find one friendly to this institution in practice, unless he happen to have Juries so well trained, that they conscientiously attend to every hint from the bench. We are not to wonder at this: no fault can be found with Judges on this account: the theoretical deficiency, the ignorance of Juries, their occasional stupidity, inadvertence, and blunders, must often place them in a disadvantageous light, when viewed from the altitude of the bench. Often the reflexion must arise in the Judge's mind, "Oh! that "these men only knew the common principles of "right and wrong." Long practice makes law maxims appear to him almost identical with these.

Even Lord Brougham wishes to supersede Juries, in cases where *the parties agree* to refer the case to the sole authority of the Judge: perhaps no stronger fact can be mentioned to shew

the tendency and the animus of jurisprudence towards Juries. But Juries are, I would not say popular, but a purely republican institution, the first fruit of liberty, and its last survivor. Public opinion supports it, and maintains it,—even though lawyers smile,—though kings may frown.

§ 21.

As connected with the history of the Swedish Juries, I will here briefly mention a peculiar constitution of a court which undoubtedly is of a high antiquity: the passage relative to it occurs in the Uplandzlagh. *

" When Judges are to be chosen, the magistrate † " shall rise and nominate twelve men from the " hundred: these twelve shall nominate two men " to be Judges. The king shall invest them with " authority to judge. These Judges shall be pre- " sent on the THING every THINGDAY. There " shall be a place appointed for a THING in every " hundred. Every seventh day the magistrate " may hold a Thing in the place appointed: he " can do it more frequently, only, if he is ordered " to do so, by a special message from the king. " The magistrate shall not convoke a THING by

* Thingmala B. Flukk 1.

† The ancient Swedish term which is used here, is *Länsmadher:* its literal meaning is *feudal lord:* Län denotes a *fief.* I translate it here by magistrate, because it was in his capacity as such, that he acted on this occasion.

" *circulars,* * unless he is ordered to do so by a " message from the king, or unless the lord of " the manor desire to hold a Thing."

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* Circulars: The code says: " BUDHKAFLA VPSKIÆRA," literally, *cut up the chip of message.* This phrase is one of frequent occurrence in Swedish laws. For the right understanding of this expression, the reader ought to compare it with the analogous Icelandic expression, " SKERA UP HERÖR," to cut np the war-arrow, which he will find explained in almost every one of the glossaries to the *Sagas,* edited by the Arnamagnean Commission of Copenhagen. The origin of both phrases is the same, viz. that in order to convoke the people speedily, either to repel an invading foe, or to hold a court, or to deliberate on any public concern; the ancient Scandinavians cut some pieces of wood in the form of an arrow or halbert, which they sent at once east, west, north, and south, to the inhabitants of the surrounding district; perhaps *Runic letters* were sometimes cut on these pieces, laconically stating the object of the meeting: but this *tessera* was forwarded from place to place with such extraordinary speed, that in most cases it would have been useless to write any thing upon it, as keeping it for a few minutes even to examine the writing, would have been a breach of law, and ancient good custom: its form was typical of tbe rapidity with which it was desired it should be sent. In Iceland this custom is still preserved, only with this difference, that the magistrate of the district summoning the inhabitants to a THING in the month of May, wraps a proclamation written on paper round the wooden halbert. The inhabitants are still anxious to forward it with great rapidity. They read the proclamation at the doors of their houses—holding it nnlawful to take it under their roof—and theu send a fast running boy away with it to its next stage. Its route is prescribed by ancient custom, and carrying it to any other place than the customary one, is a breach of law, punishable by a considerable fine. Respecting the carrying of the *Budhkafla,* the *Uplandzlagh* prescribes as follows:

This passage is rather remarkable, with reference to the early history of Juries, for it tends to confirm a theory, which I hope the reader already may have formed from several juridical facts stated in the preceding paragraphs, namely this: that in ancient courts Juries were *every thing*, and Judges were functionaries only of secondary importance; and that authority and power originally vested in the Juries, have, under the progressive developement of monarchy, been transferred from them to the Judges. In general, most of the ancient Scandinavian institutions are popular, or republican; and in every successive page of the history of these nations, we observe them gradually losing that character, and becoming more exclusive and monarchial. This passage further is interesting, as we from it may infer, that in very ancient times*

" If the magistrate issues circulars according to the king's " letter or message, he shall send one into each quadrant, " [of the circle—the horizon.] This circular must always " go forward, and not retrograde. A widow is not ordered " to carry the circular, nor a cottager living in the woods. If " the circular enters a town from the east, it shall go from " thence by the west: if it enters by the south, it shall go " out by the north. All men shall carry this circular: far- " mers and countrymen, and all except noblemen. Whosoever " miscarries the circular, or drops it, so that the Thing is " not summoned according to the king's message, shall pay a " fine of three marks. If he miscarries or loses it when the " summons is issued by the lord of the manor, he shall pay " a fine of three ores."

* The Uplandzlagh is one of the most ancient of the Swedish codes. Its first edition was certainly compiled a considerable time before the introduction of Christianity in Sweden,

the Jury nominated the Judges,—soon after the Judges had in their turn to nominate the Jurors. The two Judges we find here are peculiar: yet they occur in some few Swedish codes more, as in the *Sudermannalagh*,* and the Wästmannalagh.† It is also peculiar to these codes, that the Judges are called Domarar;‡ for in the other codes they are almost always styled Lawmen, (Laghmän:) but in the Helsinglagh,‖ although the mode of nomination be similar, the Judge is but one as usual, and here too, he is styled Laghman, as in the *Landzlagh*, and most commonly in the other codes.

§ 22.

Before leaving the subject of Swedish Juries, it may be not altogether uninteresting briefly to

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i. e. before the year 1000. This we learn from king Byrgher's preface. "*Lagha yrkir war Wigher Spa Hedhin i hed-*
"*num tima*," *i. e.* "The author of the law was Wigher Spa,
"a heathen man, in a heathen age;" and the king adds:
"Whatever we found in his law compilation universally use-
"ful, we have put into this book; but whatever is useless,
"and a *mere encumbrance*, we will exclude. Likewise what-
"ever was defective in the laws of this Pagan, as all that ap-
"pertains to Christian and ecclesiastical law, we shall add,
"and insert in the beginning of this book." The date of this preface is "*from the birth of God, one thousand two hundred*
"*ninety and five years.*"

* Thingm. B. Chap. 1.

† Thingm. B. Flukk 1.

‡ A term best corresponding with the English term judge, in all its senses.

‖ Thingm. B. Chap. 1.

notice their present state in that country. My only source of information, with reference to this subject, is the Swedish code, which was confirmed and received as a law by the Swedish Diet in the year 1734; * but this code being still in force, is perhaps as good an authority as can be desired.

I find no law in this code respecting the election of Jurors, neither how nor by whom they are chosen; only in the case when some of their number are challenged by the parties, the magistrate or the lawman are authorised to choose others in their stead;† and from this, in all likelihood, it may be inferred, that the Judge chooses the Jurors *in every case*. Probably this important point has been purposely omitted, because the practice of the Swedish courts at the time when this code was compiled, had become so very different from the ancient practice, and diverged so widely from the old rules, that if a law founded on precedents then extant had been inserted in the code, it would have afforded an opportunity to an odious comparison with the ancient standards, which were far more liberal and republican in their spirit. Care has been taken, however, to preserve the ancient form, at least, of the Jury. "The first, (i. e. the lowest) "tribunal‡ in the country is the Hundreds Court, "(Härads Rätt;) there the magistrate (Härads-

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* "Sweriges Rikes Lag gillad och antagen på Riksdagen ăr 1734. Tryckt uti Stockholm, 1746, 4to.

† Rättegăngs Balk. Chap. xiii. § 4.

‡ Prima instancia.

" höfding,) judges along with the twelve farmers " resident in the Hundred, *who are chosen* * " for that purpose. *These twelve are the Jury of* " *the Hundred,* (Härads Nämd.) Next the pre- " ceding is the Lawman's Court, to which ap- " peal lies from the Hundred Court; there the " Lawman judges along with twelve Jurors, from " the Courts of the Hundreds in his jurisdiction. " In towns the *Kämner's Court* is the first tri- " bunal. There a town-councillor shall preside, " and his assessors shall be the *Kämners* (alder- " men) of the town. The second tribunal is the " Town-Council Court, where the burgomaster " (i. e. the mayor) judges along with the town- " councillors. Above these are the *Hofrätter* (i. e. " the Royal Courts, literally the Courts or Tri- " bunals of the *Court,*) to whom appeals lie from " the Lawman's, and Town-Council Courts. †

" The Royal Court being THE KING'S SUPREME " JURY, ‡ shall take care, that in all the tribunals " under it, justice shall be administered according " to law rightly interpreted." ‖

In this last sentence lies the clue to all innovations on the northern courts, as far as the Juries are concerned. " The Royal Court is the king's " supreme Jury." Aye, so it was under the *Landzlagh,* and under all the other ancient codes;

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* How? and by whom?

† Rättegångs Balk. Chap. I.

‡ " Hogsta Nämnd."

‖ Rättegångs Balk. Chap. viii. § 1.

or rather the phrase was thus :—" The king's " Jury is the supreme court in the country." This inversion of the phrase, however,—this substitution of subject for predicate,—makes rather a material difference. That which in the modern code is called the king's *supreme Jury*, is no Jury at all, but a bench of learned Judges ; such was not the king's Jury of the *Landzlagh*, it was chosen from among the citizens, like all other Juries. But herein lies the secret : the legislator knew that the name, the term NÄMND, was still popular ; and therefore he wished it to appear that the institution had been preserved in its purity, and that justice was still administered under its auspices as formerly, in every tribunal of the land. If the people should happen to consider and reflect, that the assessors of the High Court were not Jurors chosen by them, or at least from amongst themselves, they were told that they were thus freed from a considerable trouble and expense, and justice at the same time better provided for, while the modern JURORS were learned men educated at the Universities, men of unquestionable principles, superior to all partiality, and so forth. That besides, they having this *only duty* to perform, to hear causes, and investigate subjects of complaint, they were able to do it much more satisfactorily than men unused to it, and who had their own occupations to mind besides,—who came to court unprepared, driven thither by dire necessity, and were anxious to get out again with all convenient speed,

—who accordingly would hasten to make up a verdict of some kind or other, and have done.

This could not be the case with the new assessors, said the crown lawyers; for their responsibility was high, and their punishment heavy,—nor was there any excuse for them, if they neglected their duty, or hurried through it carelessly.

By this reasoning, similar in its spirit to that of the Emperor Alexander, by which he argued that government on holy-alliance principles, was far better than constitutions,—the illusion was kept up, and the doctrine propagated, that the modern courts of learned assessors were only improved Juries.

The Hundred's Jury and the Lawman's Jury of this code, bear still a resemblance to the ancient institution; but it is only a resemblance.

§ 23.

As to the case when Juries disagree about the verdict, we find in this code the following rule:

" When judgement is to be given on a HUN-
" DRED'S THING, or on a LAWMAN'S THING, the ma-
" gistrate and the lawman shall inform the Jury
" about the nature of the cause and its circum-
" stances, and likewise state what the law says in
" such a case. If the Jury differ in opinion from
" the magistrate or the lawman, the opinion *of*
" *the Jury shall prevail*, and they shall be respon-
" sible for their sentence. But *if the Jurors do not*

" *all agree,* the decision of the magistrate or law-
" man shall be final."

" But if the members of court *in other tribunals*
" do not agree, that sentence shall be decisive in
" every cause, which the *majority agree upon.*
" If the votes disagree, and if there be *an equal*
" *number on both sides,* that sentence shall prevail
" which is approved by *the principal member of*
" *the court;* but in criminal cases shall prevail
" the opinion of those who absolve, or propose the
" mildest measure." *

I shall not detain the reader by pointing out the difference of these rules from those of the older codes. These differences are so obvious, that he will easily discover them himself, by comparing this extract with those quoted in preceding sections.

I shall only mention, that here again it appears how the *Jury courts, i. e.* the HUNDRED'S THING and the LAWMAN'S THING, are held in lower estimation than other courts, for when Juries disagree, the magistrate decides: when members of other courts disagree, the sentence of the majority prevails.

Here, too, we observe the same spirit as in the Norwegian code. The legislator affects indifference, as if he wished to have nothing to do with the Juries,—their degradation was to be their own work. Hence this rule, " *if they all agree their*
" *verdict shall be good,* even though it be contrary

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* Rätteg. Balk, Chap. 23. § 2, and § 3.

" to the opinion of the Lawman ;" but this, it was anticipated, would be a rare case ; in all other cases their verdict was nugatory, and the cause was then decided by the sole authority of the Judge.

§ 24.

Danish Juries.

The subject of Danish Juries has been admirably treated, and perhaps exhausted, by that illustrious lawyer Peter Kofod Ancher, who, during many years, was Professor of Civil Law in the University of Copenhagen,* and consequently also Judge in the High Court of that country : † As such, he naturally surveyed ancient Forensic in-

* See " Dansk Lovhistorie" by this author, published at Copenhagen 1769-76, 2 vols. 4to. The Author did not live to publish, perhaps not even to write, the whole of the work he intended to give to the world. These two bulky quarto vols. comprise no more than about one-third of his original plan. The most difficult part of the Law History of Denmark is, however, finished in these two vols. and the subsequent parts might be written by a man far inferior to Kofod Ancher, both in talent and learning. The passage relative to Trial by Jury in Kofod Ancher's work, is contained in a Dissertation entitled, " Om vore Gamle Retter-Ting," i. e. " On the Ancient Law Courts of Denmark." Chap. iv. et seqq.

† For in Denmark every Senior professor of the Juridical Faculty, has, in virtue of his professorship, a seat in the High Court.

stitutions with the eye of a judge, and treated Juries rather superciliously ; but, notwithstanding, he is a most conscientious and critical historian ; he takes great pains to put every fact, great and small, in its true light ; nor is he capable of extenuating, exaggerating, or in any way misrepresenting a fact in order to support a theory.

According to this author, there were four kinds of persons employed in the ancient courts of Denmark to adjudge causes, and all these were either regular Jurors, or Conjuratores in a wager of Law, or men nominated on such principles that they strongly resembled either of these.

" Before the administration of justice," says this author, " was given into the hands *of regular* " *judges*, causes were decided according to our " ancient Danish Law, either by *Tingmænd*, " *Sandemænd*, *Nævninger*, or other *good men*, " who, in certain causes, were nominated for the " purpose of swearing, as it was called. Their " sentences were called *oaths*, because they had " to decide the cause by means of an affidavit ; " and the expression, *to swear in a cause*, in the " codes, frequently signifies to judge."

I shall follow Ancher's plan, and consider each of these four classes separately, beginning with the Tingmænd.

§ 25.

The Danish Tingmænd.

This Danish term is identical with the Norse or Icelandic *Thingmenn*, the *h* being omitted in Danish Orthography, as the Danes are unable to pronounce *th*: it is a compound of the word Thing, which is explained above, and *Mænd*, the plural of *mand*, which signifies a man; and thus *Thingmænd*, means Thingmen, or those who frequent a Thing, or even are enjoined by law to be present *on* it.* In Greek, this Northern term might be rendered by Δῆμος; for, as in Athens, those constituted the Δῆμος, properly speaking, who had a right to frequent the public assemblies, Ἐκκλησιᾶι, and to vote in questions which occurred there, so the Thingmen of the Northern countries, were such men, having fixed residences within the jurisdiction of a given Thing, or Court, as had the privilege, or rather the function, of constituting the

* I think it preferable to follow the Scandinavian phraseology, and say *on a* Thing, and not *in a* Thing; the originals universally make use of the former mode of expression, and never of the latter. *In* a Thing, like in church, in court, in Parliament, in a meeting, &c. might seem to denote an assembly under roof, and within doors, which would be inadequate. *On* a Thing seems more aptly to express a solemn meeting held in open air, *in loco edito*, and for this reason I think the ancients used it.

main stock of every *Thing* that was held. Things were indeed public and open to all; and therefore, in a certain sense, every body who visited a Thing, was a Thingman, yet such is not the *technical* meaning of the term. The Thingmen were indispensable on every THING: it could not be held without them: in ancient times no written records were kept of the proceedings on the THINGS; but the *Thingmen* were public witnesses to these proceedings, and as such, served instead of public records and Court Jonrnals: on account of this public function, they are also called *Tinghörere*, (the hearers of the Things); and in order that no transaction which took place should escape their notice, they had the privilege of sitting within the enclosures of the sacred staves and cords; and, for this reason, they were termed *Stokkemænd*, (Stavesmen).*

According to the Jutland Law of king Valdemar, † seven *Thingmen* made a quorum. By the Modern Seeland Law, ‡ the quorum were twelve in ordinary cases; but if an extraordinary THING

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* In some instances, however, the *Thinghearers* were different from the *Thingmen*. See Ancher's Lov-Hist. vol. 2d. p. 437, where *Thingmen* appears to be the more general term, denoting all who frequented the Thing, and *Thinghearer* to denote public witnesses chosen from amongst the *Thingmen*.

† B. I. Chap. 38.

‡ There are two Codes entitled the Seeland Law; the one is called the Ancient, the other the Modern Seeland Law: both are, however, very ancient Codes. The passage here alluded to, occurs in B. III. Chap. 22, and 23.

was held on holy days in a case of theft, *twenty-four* were required to form a quorum.

The Thingmen were not *essentially* jurors; but accidentally, they were not unfrequently employed in that capacity; their proper business was to observe what took place on the THING, and thereby to render themselves fit to give evidence afterwards as to what was done there, if such an evidence should be required; but they had also to adjudge causes like other Jurors, where no other Jurors were provided by Law, or even where no others could be had. In such cases, they were a kind of *extempore jurors.* They had to determine the day when the parties in a cause were to meet on the THING. * That they were empowered to adjudge certain causes may be seen from the Scania Law; † for this reason does Anders Suneson also call them *juridicos.* But according to the Law of King Erik, ‡ they were not only authorised to judge, but they had also a considerable equity jurisdiction, as they superintended the division of succession, the administration of the property of infants, and its delivery to them when they became of age.

As to the mode in which the *Thingmen* judged, there is no doubt whatever that they judged such causes as came under their cognizance in the same

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* Skänske-Lov. ii. 14, iv. 20, vii. 7. King Erik's Law iv. 21, 22, 23. v. 20.

† Skänske Lov. iv. 20, vii. 1, 3, 9, 15, 20, 21. ix, 4, 15, 23. xiv. 4.

‡ I. 31, 44, v. 4, 5, vi. 11.

manner as regular Jurors, i. e. by simple *majority of votes.*

§ 26.

Nævn or Nævninger, i. e. *The Regular Juries of Denmark.*

The *Thingmen* were only a kind of vicariating Jurors, and their jurisdiction was confined to causes of a certain description, and these were, upon the whole, not the most important. To take cognizance of graver causes, and to adjudge them, was, in Denmark, as well as in Sweden, the peculiar province of the Jury, which, in this country, was styled *Nævn* or *Nævninger*, i. e. Nomination-men.

This institution is, in Denmark too, of very high antiquity; to a certainty its origin is of an anterior date to every one of the Danish Codes, although they are very ancient. The passage in Saxo, which alludes to Ragnar Lodbrok, has been noticed above. I will not lay great stress on that passage, as Ragnar's age is not quite certain. But Ancher has satisfactorily shewn, that the trial by Jury is in Denmark of an earlier date than the reign of Harald Svenson (commonly called Harald Hone), because this King introduced Wager of Law instead of *Nævn*, or Jury trial, formerly in use.

The trial by Jury is more ancient in Denmark,

even than the ecclesiastical ordeals; but, during the period when this latter mode of trial was most in vogue, it fell into disuse, particularly in Scania,* which, at that time, was one of the most considerable provinces of the Danish dominions; but, in the beginning of the thirteenth century, when the ordeals were abolished, the trial by Jury was again revived, and ordered to be employed in all cases where the ordeal of hot-iron had been used previously.†

The trial by Jury was in Denmark used only in the most important causes: according to the Jutland Law, we find it had to take cognizance of robbery, theft, accidental misdemeanors, forgery, arson, piracy. ‡ By the *Sealand Law of King Erik*, the Jury had to judge of homicide, adultery, wounds, blows, confinement in fetters, violence against the person, arson, warlike aggressions, and of all causes amounting to forty marks, &c.; § but even in these cases, the defendant could not be compelled to submit to a trial by Jury, unless the

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* It is for this reason that the Trial by Jury is so rarely mentioned in the Scania Laws; this Code was promulgated during the reign of Ordeals. It occurs, however, even in this Code, although not frequently. In case of theft, for example, a choice is left to the accused between the hot iron ordeal, and a trial by Jury.—Scania Law, vii. 11. It was also left to a Jury to decide whether a *wound* was deliberately or accidentally inflicted, v. 25, and there are a few cases more submitted to their cognizance.

† Ancher's Lov. Hist. vol. ii. p. 444.

‡ Jydske, Lov. ii. 40, seqq. iii. 64.

§ Sealand Law, ii. 4, 14, 28.

prosecutor brought witnesses against him, or, at least, by his own affidavit, enforced his accusation. When there were no witnesses, the defendant was ordered by the Scania Law, when the case was a very grievous one, to clear himself by an ordeal of hot iron ;* but by the Sealand Law of King Erik, he had, in such a case, to free himself from the accusation by a Wager of Law, consisting of three times twelve Jurors.†

This circumstance appears peculiar in the history of Jury trial in Denmark ; that before it was resorted to, some previous proof of the truth of the accusation was required : the prosecutor must of necessity either bring witnesses, or swear to the indictment against the adverse party ; this previous proof, it was the business of the Jury either to confirm or reject ; when there was no such proof, the defendant had to clear himself by a Wager of Law, consisting of three times twelve persons. This previous proof was held to be so material, that if the accused had prepared a Wager of Law earlier than the evidence of witnesses was offered, the Law of King Erik exempted him from trial by Jury altogether.‡ But the Jutland Law says, "*Mand kand ey fange Herritz-neffn aff anden "vdeu at hand suer hannem gierningen paa haande.*"‖ i. e. No man can require of another that he submit to a trial by Jury, unless he avers by an oath that he has committed the deed. Such an

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* vii. 11. † ii. 14, 17, 23, 24, 27, seqq.
‡ ii. 28. iii. 20. ‖ iii. 64.

oath, by which a man confirmed his accusation against another, is, in ancient Danish Codes, called ASWOREN ETH, literally *onsworn oath;* an oath by which a man swore the commission of a deed ON another. This oath was, in its nature, similar to the *juramentum calumniæ* of the Roman Law, for the prosecutor had to swear that he did not accuse the defendant from envy or malice, but because he knew him to be really guilty. * By this affidavit, the prosecutor also bound himself to persist in the prosecution, and to have the case tried by a regular Jury; if he failed to do so, he had to pay three marks to the accused, and other three to the king.† While the ordeals were in use, the same kind of oath had been required of the prosecutor before the accused could be subjected to the ordeal of hot iron, as may be seen from the passages of the Scania Law which were quoted above.

As the Danish laws submitted only the most important causes to trial by Jury, they took particular care that only good and impartial men should be chosen Jurors. They were accordingly selected from all the inhabitants of a district—*de tota provincia*—says Anders Suneson, vii. 8.‡ No friend or relative of the parties could be chosen Juror.‖ None, says the code of King Erik,§ who was re-

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* Scania Law, vii. 13. † Jydske Lov. ii. 41.

‡ See also the Scania Law, v. 9, vii. 11. The Jutland Law, ii. 51, iii. 64. The Law of King Erik, i. 22, ii. 9, iv. 38, v. 27.

‖ The Scania Law, v. 9. The Jutland Law, iii. 64.

§ ii. 28, iii. 15.

lated to the prosecutor nearer than the third degree; and of those who were already chosen, the defendant could challenge three. The Jurors needed also to be men of some substance, that they might be able to pay a compensation to the injured party, in case they should find a wrong verdict. They needed to be "THREE MARKS-MEN;" *i. e.* men who could pay three marks if they found an unjust verdict. According to the Scania law, those who found a person guilty of homicide, must be possessed of property amounting to six marks; the reason is stated, that they might be able to pay three marks to the accused, if he were afterwards found innocent in spite of their verdict, and other three to the Archbishop.*

Most regularly the Jurors were chosen by the inhabitants of a district; yet, according to the Scania and Sealand law, the prosecutor could nominate them in certain cases;† and by the Jutland law, the magistrates in some other cases, such as, forgery, arson, and highway robbery;‡ and also, *when the inhabitants of a district refused to nominate Jurors.*‖ For it seems that it often was difficult in Denmark to prevail on the people to nominate. It is easy to guess the cause of this unwillingness. The law respecting Jurors was so very severe, and the risk they run of incurring a heavy expence and fine so great, that the honour of being chosen Juror must have been considered

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* v. 38. † Scania Law, vii. 11. King Erik's Law, ii. 28.
‡ Jutland Law, iii. 64. ‖ Jutland Law, ii. 51.

as a great evil, and it was therefore odious to inflict this calamity on one's neighbour. Even the Magistrates were far from being anxious to nominate; the odium of nomination was therefore, by the consent of all parties, often thrown on the prosecutor. This was considered fair, in as much as he was the most likely person to know who there were most capable to investigate the cause, and bring the truth to light; and besides, the part of a prosecutor was at any rate an unpopular one; let him therefore take on himself the nomination of Jurors (thought the Danes), along with the other inconveniencies of the cause. In Jutland, this difficulty was avoided by nominating Jurors annually for trying all such causes as belonged to a Jury, during the whole year. This nomination was accomplished by the inhabitants of the district, and they had to state publicly to the Magistrate on the THING whom they had nominated.*

The number of Danish Jurors was originally twelve. That number was common to all the northern countries: at subsequent periods, the law of Denmark was somewhat changed in this respect. In Scania the Jurors were twelve in number; but as the accused was permitted to challenge three, the Scania law ordered either that fifteen should be nominated at first, † or that the prosecutor should nominate three to complete the number twelve,

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* Jutland Law, ii. 51. † v. 9.

after three had been challenged by the defendant.*

The Jutland law, always displaying an anxiety to avoid great numbers, as causing unnecessary expence to the inhabitants, orders that there shall be *eight* Jurors only in each hundred,—two in each quarter.† *Kindred Jury*, however, consisted of twelve, even by this code, as well as Juries that took cognizance of forgery, arson, and highway robbery. In these cases, three Jurors were chosen of each quarter. According to the law of King Erik, the number of Jurors was *thirteen* in the most important cases, and *seven* in the less important. This is twelve, and the half of twelve, with one additional, in order to secure a majority. In case of warlike aggression, and in cases amounting to forty marks, *sixteen* Jurors were nominated by King Erik's law ;‡ according to iv. 15. of the same code, *thirteen ;* and to judge of wounds and robbery, *ten ;*‖ but sixteen and ten amounts to the same thing as thirteen and seven, for three were challenged of the two former numbers, leaving only thirteen and seven to judge, or, as the Danish phrase was, *to swear*. Between the numbers of Jurors of Scania and Sealand, there was this difference, that sixteen were chosen in Sealand for weighty causes, and in Scania only fifteen ; deducting three from each of these numbers, we have thirteen and twelve ; *i. e.* in Sealand, one was

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* vii. 11. † Jutland Law, ii. 51.
‡ ii. 9, 18, 28. ‖ iii. 15, 21.

added to twelve, in order to secure a majority; but in Scania this improvement had not been introduced. The basis of all numbers of Jurors is the number TWELVE.

When the Jurors were chosen, they had to consult the best men in the district, and take their advice, whether they should join the other Jurors or not, and what they should *swear*, *i. e.* what verdict they should give, * and accordingly a space of *seven nights* was granted them to investigate the truth. † Their oath in the law of King Erik ‡ enjoins, "*that they shall have enquired and investigated according to the best of their ability.*" ‖ It is peculiar to the Jutland law that the Jurors, as well as the SANDEMÆND of Jutland, (of whom more will be said hereafter), before they took the cause into consideration at all, were, by a sentence of two FYLLINGS MEN, § ordered to *swear*, *i. e.* to judge according to law. (Jutland Law, II. 42.) The object of this contrivance, I think, was to remove from the Jurors, in some degree, the odium which attended their function; for it is evident, from many circumstances, that the office of Juror was in Denmark held to be an odious office.

But could the Jurors be compelled to SWEAR? Ancher affirms that they could, by the Jutland law, ¶ and that if they refused, they had to pay a fine of

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* Jutland Law, ii. 42. † ii. 53. ‡ ii. 28, iii. 15.

‖ "At de haffthe spwrt och leeth och kwnne ey ræthere spörie."

§ The term literally signifies, *suppletory men.*

¶ ii. 51, 52, 82.

three marks to the person in whose cause they were required to swear; nor was the Juror excused by once paying such a fine, but he had to pay the same fine as often as he refused to swear when he was nominated, until he became so poor, by paying the fine repeatedly, that he was no longer worth such a sum; for we have seen above, that the property of three marks was a necessary qualification in a Juror. The Juryman's function was a *munus*, or rather an *onus publicum*, from which no qualified inhabitant of a district could claim any exemption. Ancher is of opinion, that the law was not quite so strict in this respect in Scania or Sealand; but I apprehend that that opinion is not well founded.

If any man wished to challenge the Jury, or advance objections against it, he had to do so in the presence of the greatest number to be had of the best men in the district. According to an ancient Danish code,* the bishop, along with the best *eight* men of the district, had the power of confirming or rejecting a Jury, or a College of *Sandemænd*. If the sentence of the Jurors was reversed in favour of the accused, they forfeited, by the Jutland law, their entire moveable property. The code states expressly, that even "*if they were all unanimous*, "*they shall forfeit their property, when they have* "*given a verdict contrary to* the opinion of the "plurality of the best men in the district."†

In Denmark, as well as in Sweden and Iceland,

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* Thor Degn's Articles, art. 18 and 19. † ii. 42.

THE CAUSE WAS DECIDED BY THE MAJORITY OF THE JURORS. * According to the royal Edict concerning *ordeals*, there were to be nominated fifteen men of the district in cases of theft, wounds, and homicide, of which number the defendant could reject three. If some of them *swore* one thing, and others another, that was held good which was *sworn* by the greater number. But if *six* swore one thing, and the other six another, six more were added to the number of Jurors, and the *oath*, *i. e.* verdict of the majority was then received; but if these last mentioned six also divided equally, then three were added, and thus at length a majority secured, the total number being twenty-one.

The law of King Erik avoided this trouble and delay, by making the number of actual Jurors uneven at first, (thirteen and seven, see page 124). The Jutland law, which made the number of Jurors *eight*, added *three* to their number when they divided equally. †

In certain causes, it was not sufficient that the Jurors were good and respectable men; they must also be related to the party. They were therefore called KÖNS-NŒVNINGER (Kindred Jury). According to the codes, they should be related to the prosecutor within the third degree, and resident in the district or county, (Syssel).‡ If there were no

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* See Law of King Erik, iii. 15, ii. 28. Jutland Law, i. 52, ii, 7, 55, 79.

† Jutland Law, ii. 55.

‡ Jutland Law, i. 1. Law of Scania, i. 2, 4. Law of King Erik, i. 2, 19.

relations to be had, the best men of the district were chosen.*

The kindred Jury were, in the laws of Scania and Sealand, employed only to decide causes in which families were concerned, as ex. gr. the following questions: Whether a child was born alive, or still-born? Whether it had been baptized? Whether it had survived its father or mother? In the Jutland law, the Kindred Jury is very frequently employed, not only in family, and other civil causes, but also in criminal causes.

The Jutland law also mentions SHIP JURIES, who decided in causes which occurred among sailors; and also BISHOP'S JURIES and CHURCH JURIES, who were summoned and sworn by the Bishop or by his Commissioner, to judge of Sabbath-breaking, Witchcraft, Sacrilege, Deeds of Settlement, &c. The Bishop's Juries and Church Juries seem not to have been identical; only Sabbath-breaking appears to have belonged to the jurisdiction of the former.

These instances, I hope, are sufficient to shew, that the Trial by Jury was in most extensive use in Denmark: in fact, it may be affirmed, that its use was universal in all courts, and in all sorts of causes; but other modifications of the same institution employed on different occasions, of which I shall presently treat more fully, indicate that Jury Trial was of long standing in Denmark, inasmuch as it was subjected to the test of experience in such

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* Law of King Erik, i. 20, v. 3.

a variety of forms; the regulations, moreover, which we find in Swedish and Danish codes respecting Juries, are so multifarious and detailed, and in some instances so peculiar, that even in absence of historical records, to prove their high antiquity in these countries, the laws and decrees which the Swedes and Danes have made concerning them, would incline us to consider Scandinavia as their most ancient and peculiar home. But we have seen that history confirms what jurisprudence could only conjecture in this matter.

§ 27.

Sandemænd (Veridici.)

The principal *Remedium Juris* for deciding weighty causes was the Trial by Jury *(Nævn)* according to the laws of Scania and Sealand; and when a regular Jury was not employed, the cause was decided by means of a *wager of law*. But in Jutland, a peculiar species of sworn Judges or Jurors, who were called SANDEMÆND,* were employed besides these, for deciding important causes. According to the Jutland law, the *Sandemænd* took cognizance of homicide, cutting and maiming, rape, warlike aggressions, litigations concerning limits of land, wounds, causes in which church

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* The term signifies *proofsmen*, or *truthsmen*.

property was concerned, and confinement in fetters. *

The term *Sandemænd* is derived either from the verb SANDE, to prove, or the adjective *sand*, true; the Latin term *veridicus*, by which the Danish lawyers used to translate it, and from which the English term *verdict* may be derived, favours the latter derivation. They had also to swear "*at de* "*intet andet vilde udsige end det retteste og* SAN- "DESTE *de vidste*," † *i. e.* "That they would state "nothing but what they knew to be most right "and true." All Judges and Jurors were, indeed, expected to tell the truth, and nothing but the truth; but it seems that the common and ordinary means for bringing truth to light in the courts were not held quite sufficient. It is manifest from many circumstances, that the Danes entertained apprehensions that their Jurors were not always as independent as they ought to be; and when we consider that they were often extremely unwilling to serve,—that the law compelled them to it by rigorous means and heavy fines,—and that the function was generally held to be burdensome and odious, there certainly appears to have been some ground for such apprehensions. It is, I think, not improbable that the *Sandemænd* of Jutland owed their origin to these apprehensions, or at least those who wished to advance the power and influence of the

* Jutland Law, ii. 2.

† Jutland Law, ii. 4. In Latin, I would thus express it: "Se nil esse in medium prolaturos nisi quod nossent ad rec- "tum verumque proxime accedere."

Crown in the courts of law might plead such fears in vindication of the plan of instituting CROWN JURORS (for such were the Sandemænd in reality), to whom they gave this fascinating title, by way of intimating that they were more TRUE and independent than other Jurors.

There were *eight Sandemænd* chosen for Jutland,*—*two* for each quarter of the country. Every one of them must possess a landed property in that part of the country in which he was a *Sandemand.* They received their vocation from the king, and were sworn in by a crown officer. They were ordered to *swear, i. e.* to judge on the spot where the deed had been committed, and when limits of land were the subject of litigation, in that district within which the debated land was situate.†

VOGT, in his "*Comment. de Homicidio,*" has taken some pains to prove that the *Sandemænd* were regular judges. He might have saved him-

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* We have seen above, that the ordinary Jurors of Jutland were also *eight* in number. The predilection for this number is peculiar to the Jutlanders, for in all other northern countries, the basis of the number of Jurors was universally twelve. The Scottish fifteen are clearly the Danish fifteen; but in Scotland, the original custom of permitting the defendant to reject three of that number, and thus reduce it to the ordinary amount of twelve, has fallen into oblivion; or perhaps it was abandoned in order to secure a majority.

† Jutland Law, ii. 3, 11. And such being their function, they were often obliged to *ride* around the place, on the limits of which they had to decide: hence the more modern Danish term, *Ridemænd*, i. e. *Ridingmen.* Confr. Engl. East and West *Riding* of Yorkshire.

self the trouble. This institution is unquestionably a modification of the Jury, and the Sandemænd a kind of Jurors, and not learned judges. The cause of Vogt's mistake is this: he read the northern codes, having his head previously full of civil-law notions. In the course of his inquiry, he repeatedly put this question to himself, or rather to the Danish codes: *Where are the judges?* —the learned judges? He could not conceive the possibility of a court without these. The trial by Jury, in its ancient form,—the primeval simplicity of the northern courts, was unintelligible to him. That the magistrates, though they sometimes bore the name, were not in reality judges in the Roman sense, or in the modern sense of the word, he could not avoid observing; still he was constantly on the look-out for JUDGES, and finding nothing that approached nearer to judges of the description which he wanted, he laid hold of the *Sandemænd*, and after a Russian manner, dignified them with a posthumous rank. But I humbly conceive, that the Sandemænd may be considered as an institution, by which an attempt was made to assimilate in some degree the northern tribunals to the civil-law tribunals of southern Europe; still the Sandemænd were Jurors, and not judges,—not judges in any other way than ordinary jurors had been.

The points of difference between the *Sandemænd* and ordinary Jurors, are the following:—

1. The former were nominated by the king, the

latter either by the prosecutor, or the inhabitants of the district, or by the magistrate, or finally, by any impartial man. *

2. The *Sandemænd* continued in their function until they were deposed for an unjust verdict. The Jurors were either chosen annually, or for each cause that occurred.

3. The *Sandemænd* were always eight in number; the Jurors sometimes *eight*, and sometimes *twelve*.

4. Jurors could not be called upon, in Denmark, to decide a cause unless some previous proof was led, or the prosecutor had sworn to the truth of the indictment against the defendant: such a proof was not required when *Sandemænd* were employed.

5. Jurors were obliged to swear, without receiving any fee. The eight *Sandemænd* received half a mark of silver for horse-hire, which was to be paid by the party who required their service, whether they swore for him or against him.†

6. Of Jurors, the defendant could reject *three*; but of the *Sandemænd*, the Jutland law says:— "No man must reject any of them, unless they "have forfeited their property by an unjust *oath*, "or they exact a higher *horse-hire* than they are "entitled to."‡

7. Sandemænd were used only in the courts of

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* Jutland Law, iii. 64.

† Jutland Law, ii. 5. ‡ Jutland Law, ii. 1.

Jutland and *Funen;* but in Scania, and in Sealand, sometimes ordinary Jurors were employed in similar cases, sometimes Wagers of Law, and sometimes, particularly in litigations concerning land, old men who acted as umpires between the contending parties.*

But in this, the *Sandemænd* resembled other Jurors, THAT THE VERDICT OF THE MAJORITY WAS RECEIVED AS A FINAL SENTENCE:

" *Skil Sannendmæn a tha scal thet stande ther*
" *flæræ göræ :* vten af the bæstæ bygdmen, oc the
" sannest attæ oc biscop wintær thet the haue gorth
" vlogh æth, vræt eth bothe. en sueræ the allæ
" et oc suo openbarlic men. sum the suoræ ænnen
" man til annens banæ ther æi war tha ær hin
" worth dræpen i the bygd, eth a thet land tha
" mughæ wal theræ boos loot for göre, for thi at
" Sannend scal æ wæræ riker en logh or kærær.
" Æn æf flæste mæn sækthe them ei oc suæræ the
" allæ eet, tha scal thet standæ." †

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* Scania Law, iv. 7. Law of King Erik, iv. 15.

† This passage is thus translated by Peder Lassen: " Cum
" inter *veridicos* non convenit, quod *pluribus placet, eo stabitur,*
" nisi octo honestiores optimæque fidei, ejusdem loci viri, una
" cum Episcopo censuerint contra jus et æquum fuisse, alias
" multam solvent. Sed si omnes similiter juraverint, verum
" tam liquido falsum, ut omnibus palam sit eos pejerasse;
" forte si quem alterius homicidii reum fecerint, qui tamen
" tum, cum cædes patraretur, in ea urbe vel regione non fuit,
" tamen bonis omnibus multandi, veritas enim stricto jure
" potior erit."—Jutland Law, Ancher's Edit. p. 88.

§ 28.

Wager of Law in Denmark, (Danice Lov.)

Besides the three kinds of Jurors of which I have spoken in the preceding paragraphs, the *Wager of Law* was very extensively used in the Danish courts. The Danish term by which it is designated, is Lov, the literal meaning of which is Law (Lex.) The strict and special juridical signification of this term, however, completely corresponds with that of the English term, "Wager of Law;" but we find it is also used in the ancient codes, in a sense more vague, general, and undefined, for it sometimes denotes every *remedium Juris*, employed in the courts for the decision of causes; when used in this sense, it comprises even the Nævn, or Jury, under it. The Sealand law of king Erik * speaks of "*Nævn eller anden Lov*," *i. e.* Jury, or any other law, (viz. remedium Juris.)

But by the most common acceptation of the term Lov, it denotes an oath, by which the defendant established his innocence, and disproved an indictment. Thus a Tylter Eed, (twelve men's oath,) which is a term synonymous with Lov, † is

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* vi. 9.

† But the Lov might, however, consist of twice, three times, or four times, twelve, or of half a dozen. The Danish Law of Christian V. uses this expression, "Lov, som er Tolv mænds Eed. Danske Lov. i. 14, 8," *i. e.* Wager of Law, which is twelve men's oath.

distinguished from the NÆVN (Jury) in the Jutland law. * And the Sealand law of king Erik, mentions causes in which *Lov* may be used, and not NÆVN. †

It is of particular interest to the English lawyer to be minutely and accurately informed concerning the Wager of Law, not so much because this mode of trial formerly was in use also in England, but more particularly, because in the English Jury as it now exists, ‡ the two institutions, Jury and Wager of Law, appear to be blended together, as it seems, rather to the disadvantage of Jury trial, which, in its more pure and ancient form, must be admitted to be a more efficient institution for forensic purposes, than the modern English Jury.

I shall therefore, using Ancher as my guide, draw a parallel between the Danish Jury and Wager of Law, and shew their characteristic differences; and I expect, by that means, to put the nature and peculiarities of both in the clearest light.

1. A fundamental difference between the *Jury* and the *Wager of Law*, appears to be this; the former was a means to discover truth; the latter, a means to disprove falsehood, at least to disprove an accusation. The Jury was a *remedium Juris* for the plaintiff, to obtain justice; the Wager of Law for the defendant, to protect him against injustice. For this reason, the plaintiff was in Den-

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* ii. 98, iii. 64. † ii. 14, 25, iii. 14.

‡ But not so much in the Scottish Jury.

mark permitted to choose whom he pleased as Jurors, because he might be presumed to know who would be most able to discover all the circumstances of the case. In the Wager of Law, the defendant was more particularly taken care of. There he simply, by oath, denied the fact of which he was accused, and his oath was confirmed by a certain number of conjuratores, who declared themselves satisfied that the defendant told the truth. We are not, however, to suppose that the Jury was a *remedium Juris* for the plaintiff *only*, and the Wager of Law *only* for the defendant. But the Jury was considered as the principal and most effective means to discover truth as far as that was possible; the Wager of Law was a subsidiary means to put an end to the litigation, where neither proofs nor witnesses were to be had. In a similar manner, the accused can, under the modern law of Denmark, clear himself of an accusation in two ways; either by evident and satisfactory proofs, or, when these cannot be had, by an oath. Therefore, the ancient codes say, that the defendant ought to clear himself of an accusation, "not only by a Wager of Law, but also by a trial "by Jury; if there be witnesses, let him defend "himself by a Jury; if there be none, then by a "Wager of Law." *

Although the laws had prescribed that certain causes should be tried by a regular Jury, and others by a Wager of Law, yet they were not so

* Law of King Erik, i. 14.

strict and definite in this respect, as not to permit the parties, when they chose to cede their right, and sanction that mode of trial which might be presumed to be more favourable to the adverse party. Thus, *ex. gr.* in causes where the prosecutor had a right to demand a trial by Jury, he might abandon that privilege, and consent to the cause being tried by a Wager of Law. In a particular case, the law of Jutland says, "Let it depend on him (the prosecutor), whether he will "be satisfied with a *twelve men's oath*, or prose-"cute by Jury."* Likewise, the defendant might, according to the Scania law, offer to be tried by Jury, if he chose; although, in cases of theft, he was not obliged to clear himself otherwise than either by ordeal of hot iron, or by a *Wager of Law of twelve men.*† By the Sealand law of King Erik, the defendant might obtain his acquittal, either by the means of a Jury, or by a *Wager of Law of twelve men.*‡

2. But whereas it was clearly shewn, by repeated experience in the courts, that these *Juramenta credulitatis inficiatoria*, when employed indiscriminately in all kinds of causes, were far from being satisfactory to the ends of justice, it was afterwards attempted in Scania and Sealand, (where the *Sandemænd* were never used, and the regular Jury less frequently than in Jutland), to put a stop to the abuses of Wagers of Law, by obliging the defendant to adduce the evidence of witnesses, besides

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* ii. 98. † vii. 11. ‡ ii. 14.

the twelve men's oath. Thus we find in the codes of Scania and Sealand, (even in the law of King Erik, where, however, the employment of a regular Jury is prescribed), two kinds of Wagers of Law mentioned; the one being accompanied by *witnesses*, the other without *witnesses*.

This is another point in which the Wager of Law differs from the trial by a regular Jury; for as we have observed above, witnesses, or some previous proof in the cause, were indeed required before the Jury could be summoned; but these witnesses did not act along with the Jury, and as it were confirm, by their testimony, their verdict or sentence; on the contrary, the testimony of these witnesses was weighed by the Jurors, and they determined whether it amounted to a satisfactory proof or not. In the Wager of Law, when witnesses were used, they had to confirm and support, by their evidence, the statement of the twelve Jurors. In the former cases, witnesses were required to satisfy the court that the case was of so great importance as to justify it in summoning a Jury,—the dignity of the Jury seemed to demand it. In the latter, the oath of the twelve men was not held sufficiently strong,—it lacked the necessary authority for the final decision of a cause, unless there were witnesses to support it.

In the most important civil causes, witnesses were required, along with the Wager of Law. Thus, one against whom an action was brought for succession, has, by the law of Sealand, the ancient as well as the modern, to defend himself by a twelve

men's oath, *and witnesses.** Yet if the subject of litigation was of small value, the defendant was not called upon to sist so *high* a Wager of Law in his defence.

3. Trial by Jury was used only in important causes, such as formerly had been decided by the ordeal of hot iron. The Wager of Law was the common legal means of deciding all causes, both great and small.

4. Some previous proof was required, as has been repeatedly observed above, when a Jury was to try a cause. In the Wager of Law, the defendant could be called on to swear along with his conjuratores whenever he was indicted, although there were no proof against him. This was first altered by Christian III., who obliged the prosecutor to prove the accusation before he required a Wager of Law of the defendant.

5. The prosecutor *swore* along with the Jurors in a trial by Jury.† The defendant swore along with his conjuratores in a Wager of Law.

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* See the Sealand Law of King Waldemar, i. 1, § 4, 5, 7, i. 2, i. 6, i. 12. Seal. Law of King Eric, i. 17, 31–35, v. 31, vi. 17, 27.

† Ancher states this on the authority of the Jutland Law generally, without quoting any particular passage. I must say I entertain some doubt about it. It would be very unreasonable, and a great blemish on the Danish Jury. It is quite contrary to the laws of Sweden, to which the Danish laws, in many respects, bear such a striking resemblance; nor can it be easily reconciled to the Scania Law, v. 9, or to the Jutland Law, iii. 64. See above, the paragraph on the Danish Jury.

6. Ancher says, " I believe there also was this " difference, that the defendant was permitted to " choose his conjuratores in a Wager of Law, where " the Jury was chosen by the prosecutor." The former of these propositions I hold to be quite certain ; as to the Jury, Ancher has himself elsewhere observed, that the Jurors were sometimes chosen by the inhabitants of the district, sometimes by the magistrate, and sometimes by the prosecutor.

7. The defendant could reject three of a regular Jury, none of those who were to swear with him in a Wager of Law. Why?—Because he had chosen them himself.

8. In a trial by Jury, THE MAJORITY decided a cause. In a Wager of Law, UNANIMITY was required. This is one of the most material differences between these two institutions. The reason why the verdict of the Wager of Law must be unanimous, is easily seen. The defendant was required to find a number of men, determined by law,—twelve, twenty-four, thirty-six, &c. to disprove a certain alleged fact, by swearing along with him that they believed his statement to be true ; if any of those whom he called either refused to swear, or even perhaps were ready to swear to the contrary, then he had failed in establishing the proof which the Law demanded; he had not found the requisite number, and he was *eo ipso* cast. If his *conjuratores* were not UNANIMOUS, those who dissented were, properly speaking, not HIS *conjuratores* at all ; as many of them as refused to support his statement were wanting in his full

number. Even when the Wager of Law was in its perfection,—even though all the members of it were unanimous, their verdict would appear to be an unsatisfactory proof in modern jurisprudence, because the defendant could choose them from among his own acquaintance, but the proof would have been nugatory indeed, if they had not at least all agreed. If the Law had connived at any deficiency in their number, it might as well have said, Let the defendant find as many conjuratores as he pleases,—a rule which no Law ever sanctioned or could sanction.

In the trial by Jury, the case was quite different: there it would have been almost as unreasonable to demand *unanimity*, as it would have been absurd not to demand it in a Wager of Law. It also appears, that none of the ancient codes of Denmark, Sweden, or Norway, ever did insist on it in a regular trial by Jury. Least of all was it reconcileable to justice, to require the unanimity when the Jurors were chosen by the prosecutor, and when the defendant only was permitted to reject three of twelve, or three of fifteen, without even having any controul over the appointment of those who were put in their stead. In theory, according to Danish Laws, the Jurors were to be independent, impartial men; they were not law-learned, and had nothing to guide them in their judgment, but common sense: of them, then, might be said, "*quot capita tot sensus.*" Some leaned to justice, others to mercy, and both parties fol-

lowed, or pretended to follow, the dictates of their conscience, and *swore* accordingly.

Inasmuch, then, as nearly the same qualifications are required of the English Jurors as were required of the Scandinavian *Nefndarmenn*, and in addition there to the *unanimity* of the Northern *Wager of Law*, and inasmuch as, in latter ages, the Wager of Law had, in Denmark at least, become more common than the regular Jury; further, inasmuch as excessive mercy was the leading fault in all forensic institutions of the North, and experience recommended greater strictness,—probably the English Jury, as it now is, may be considered as an institution blended together of two very dissimilar elements,—the *Nefnd*, and the Wager of Law, *(The Tytter Ecd)* with the *qualifications* of *independence* of the former, and the *unanimity* of the latter, *those* belonging to it naturally, essentially, and anciently, *this* being accidental, adscititious, and of comparatively modern date, adopted with the view of rendering Jury Trial more strict, and after the essential difference between Juries and Wagers of Law had been lost sight of, because the latter had been more frequently employed in the courts. Confer Bracton De Legibus Anglor. Lib. iv. cap. 19. § 4. Fleta, Lib. iv. cap. 9, § 2. Cowelli Institut. Lib. iv. Tit. 17. § 6.

9. Juries were obliged to *swear;* they could be compelled to do it. There was no such obligation on those who were summoned for a Wager of Law: if any of them refused to *swear*, the

defendant was thereby cast, and subjected to a fine or other punishment. The Sealand Law of King Erik says, "*Dölge med* xii. *Eed eller böde* iii. *Mark.*"* "*Göre Lov for eller böde.*"†

When the defendant could not find a sufficient number of *conjuratores* to complete his Wager of Law, it is in the Danish codes called that he "BRÖSTEDE LOV," (literally, that he "*lacked law,*") or also "AT HAN FALDT AF LOVEN," i. e. that he *fell by the Law*. In this case he had to pay the sum for which he was prosecuted, and besides, three marks to the king, and to the adverse party.‡ It was also called *to lack law*, when the regular Jury swore against the defendant, and cast him; and he was then said to be LOVFÆLD, i. e. *Law-felled;* but if he was found not guilty, he was termed LOVLÖS, i. e. *Lawless.* §

10. The Jury, (except only the *Kindred Jury*, and *Church Jury*) were chosen from the district where the defendant resided. "AF THET SAMME HÆRRETH HANS HYEM HWS ÆR I, says the Law of King Erik. ‖ But for the Wager of Law, the defendant might choose whom he pleased, and from

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* *i. e.* He shall disprove the accusation by a twelve-mens-oath, or pay a fine of three marks, iii. 14.

† *i. e.* He shall be tried by a Wager of Law, (literally, he shall make a Wager of Law for it) or else pay a fine. Seal. Law, iii. 26.

‡ Jutland Law, i. 43, ii. 40, 61, 73, iii. 35, 67. Law of King Erik, vi. 9.

§ Jutland Law, i. 44. Recess of Christian III. article 20.

‖ ii. 26. Confer Jutland Law, ii. 60.

whatever place he pleased; his conjuratores must only be men who had a fixed residence somewhere. Only, in some important causes, it is required by the Scania Law, that they should be *Allodial Proprietors* (Odels Bönder),* or the best men in the district,† not however knights or noblemen, as Ostersen has interpreted it, but the most respectable men of the parish or district. Only in later times, when the privileges of the nobility had become much more extensive, they began to separate themselves from the rest of the community, and refused to be amenable to the same jurisdiction as others; and when any nobleman was concerned in the cause, they insisted that the Wager of Law should consist only of noblemen:‡ but these were innovations; the ancient rule was as stated above.

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* Scania Law, i. 10, 12, 14, 19, ii. 1, iii. 3, 6, 9, 11, 12, iv. 2, 8, 7, 12, 15, 17, 20, 21.

† Law of king Erik, i. 19, 20, 21, 22, iv. 38, 39, v. 3, 34.

‡ Ex. gr. in the charter of Frederic II. art. 27. The boldness and the pretensions of the nobility at last encreased to such a degree, that they objected to a trial by Jury, and even to one by *Sandemænd* in cases of violence, warlike aggressions, breach of the peace, although the case were not so grievous as to endanger the life or honour of the party. These objections of the nobles occasioned the royal edict concerning Juries of 15th August 1590; after that the custom was, that noblemen chose nobles for *Wagers of Law*, citizens chose citizens, and farmers farmers: with this limitation, that the nobles must reside within the kingdom; the citizens must be of the same city as the defendant, and farmers of the same district. See Recess of Christ. IV. B. II. Chap. 6. Art. 21.

11. In the trial by Jury, the Jurors were commonly TWELVE or THIRTEEN in number;* the basis of the number of a Wager of Law was indeed also *twelve*, but only the half, or one fourth of that number, were required in cases of minor importance; but in very important causes the double or the triple of it. The Law of King Erik† says, that the Wager of Law shall be proportioned to the injury sustained by the prosecutor.

12. The oath of the Jury was assertorical and categorical; it determined something positively respecting an alleged fact, as GUILTY, or NOT GUILTY.‡ In the Wager of Law, the oath of the *conjuratores* was a mere *juramentum credulitatis*, by which they only asserted that they verily believed, or that they could not but believe, that the statement which the defendant confirmed by his oath was true. This, however, was subject to modifications, particularly when witnesses were joined to the Wager of Law.

It is hoped, that trial by Jury, as used in Denmark, with its many modifications and varieties, is now in some degree explained, and that the reader will perceive the characteristic differences of each. The *Thingmen* were Jurors extraordinary; the *Nævn* regular jurymen *in sensu strictiori;* the SANDEMÆND, *Crown Jurors;* and lastly, the *Lov*

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* It has been shewn above, that when *fifteen* or *sixteen* were *chosen*, the number of those who *swore* was still the same.

† iv. 13.

‡ Jutland Law, ii. 40, 43.

were conjuratores in a Wager of Law; the verdict of the majority of each of these, except the last, was held good; in the Wager of Law, unanimity was required for reasons above stated. The *Nævn* (Isl. NEFND), and the Wager of Law, are institutions common to Norway, Sweden, Denmark, England, Scotland, and Iceland; the latter we also find in the Saxon, and the Frisian Laws. Whether the *Thingmen* acted in the capacity of Jurors anywhere but in Denmark, is not quite certain. I think, however, that they did, at least in Sweden and Norway. The *Sandemænd* are peculiar to Denmark. Of all institutions of the Jury kind, they bear the greatest resemblance to modern judges: still they are not judges. They are an intermediate,—a transition institution; a little more than Jurors, yet somewhat less than Judges; they seem to have paved the way for the introduction of the latter in Denmark. That the *Sandemænd* are an invention of crown lawyers, is rendered probable, both by other reasons, and also by this,—that they subsisted longest, and continued to be employed even after the regular Jury had long fallen into disuse. Of the institutions above named, the Jury is most *republican*, and the most *aristocratic*;* the Wager of Law most democratic, and the most barbarous, perhaps it also is the most ancient; the *Sandemænd* are most monarchical, and most modern. This institution is a refinement on the Jury, but no improvement; they are nominat-

* I use these terms in their most ancient and strict sense.

ed by the crown, and dependent on it like judges, but they have none of their advantageous qualities. The conjuratores are necessarily partial; their partiality is their principal qualification, because the defendant chooses them. The Jury is the most independent and impartial of these institutions.

In all Northern Courts, the magistrates and lawmen were, at first, only *Hegemones*,—mere conductors of the process, who took care that legal forms were observed, without being judges. In this very essential point, the Northern Courts resembled the courts of Athens.

§ 29.

In the last code of Denmark,* only faint vestiges of the ancient institution of trial by Jury are observable. Here the *Jury* and the *Sandemænd* seem to be blended together; but the institution has retained the latter title. It was remarked above, that the present English Jury seems to be a mixed institution of the ancient Jury in its purer form, and the Wager of Law; in other words, an aristocratic and a popular institution were combined into one in Great Britain. It was also observed, that the Danish *Sandemænd* were a monarchical kind of Jury. In Denmark, accordingly, the new combination was made of an aristocratical and a

* The "Danske Lov" of king Christian V. published in the year 1683.

monarchical element. Both processes completely harmonize with the tendency and progress of politics in these countries respectively. The passage relative to the *Sandemænd*, or Jurors of the time of Christian V. runs as follows: " *Sandemænd* " skulle være otte Lovfaste og boesatte Danne- " mænd, og af Fogden til Tinge udnævnis, i Her- " ret, Birk eller Bye, i tvivlsom Drabs Sager, og " naar der tvistis om Marke Skiel – – – – – " Skille Sandemænd ad, da skal det stande, som " de fleeste giorde; Ere de lige, da stande det, " som Formanden giorde med dennem, som han- " nem fölge."*

Christian V. being king of Norway, as well as of Denmark, published another code for that country in the year 1687. Here the Jurors are not called *Sandemænd*, but *Lavrettismænd*, which is the ancient term LAUGRETTOMADR modernized. The qualifications, authority, jurisdiction, and number of these Norwegian *Lavrettismænd*, are the same as those of the Danish *Sandemænd;* and the verdict of the majority of the former is also con-

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* WEGHORST has translated this passage as follows: " *Veri-* " *dici* sint octo viri honestæ famæ, fixum habentes domicilium, " quod Judex in Herreda, Birka aut oppido ad causas homi- " cidii dubias, necnon finium regundorum controversias diri- " mendas in Judicio nominet." Jur. Dan. Lib. I. Cap. 16. Art. 1. " Si *Veridici* in *diversas abeant sententias*, illud valebit, " quod *major pars egerit.* Sin pares utrinque fuerint senten- " tiæ, quod primus (i. e. Præses) cum sequentibus concluserit, " validum erit." Ibid. Art. 15.

clusive. The jurisdiction of both is confined to the cases specified above.*

Although the *Danish Law* of king Christian is, with the exception of some articles which have been repealed by specific royal edicts, still in force, and although I apprehend that the articles relative to *Sandemænd* have not been formally repealed, it is certain that the Sandemænd have now entirely vanished from the Danish courts, and that it is not the practice at present to summon them, or refer any case to their judgment or hearing,—not even those few which the *Danske Lov* had reserved for their cognizance. All court business is now carried on within closed doors, except only in the High Court of Copenhagen, which is a Court of Appeal for the whole kingdom; and in the other courts, where generally a single judge presides, being assisted by a certain number of assessors, who are like himself, learned judges, no part of the process transpires beyond what the parties themselves may communicate to their acquaintance until its conclusion, when the sentence is published in the newspapers, which, however, is not always done, but only in some cases. In all these inferior courts, the pleadings are written, and the whole process so conducted, that the Jury could not possibly be employed. The High Court, in which a Chief Justice PRESIDES,† with twelve assessors, is

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* Confer NORSKE LOV, B. I. Chap. 5. Art. 30.

† I say *presides*, meaning *virtually* not *formally*; for it is a theory scrupulously maintained in this court, that the king

the only one that is open to the public, and there too, the pleadings are verbal; *eight* advocates (called advocates of the High Court, *Höjeste Rets Advokater)* being privileged to plead in it, except when the parties themselves choose to plead, which, however, is an uncommon case. But there is now no appearance of a Jury in this Court, any more than in the inferior courts; probably the twelve grave men of the scarlet robe are considered to be more than ample compensation for the ancient institution, now entirely superseded.

§ 30.

Glance at the History of Iceland, particularly with reference to its first settlers—Scandinavian civilization, and its influence on European culture.

The Island of Iceland continued an aristocratic republic from the time of its discovery in 874, when the Norwegians first settled there, till the

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presides there perpetually. The throne is placed in the court, and althongh his Majesty never takes his seat there more than once a year, yet the advocates are, by the custom of the court, bound to imagine that he is seated on the throne, and to address him as present. This form, it is thonght, confers solemnity and dignity on the court. This court enjoys a very high reputation for learning, incorruptibility, and strict justice. A precedent in this court, has, in doubtful cases, almost the force of law.

year 1262, when the Icelanders voluntarily offered homage and submission to HACON THE OLD, king of Norway.* Thus the republic of Iceland subsisted during four centuries, bating twelve years. Like most other republics, that of Iceland had eminently good laws; its fate, too, was like that of several others, *it fell* by the weakness of *the executive*. Much liberty engenders many quarrels and much litigation, and frequent litigation exercises the mind concerning the notions of right and wrong. The evil of contention spurs men on to seek the remedy,—*just and equitable laws;* and just as there are better physicians in a populous town than in a thinly inhabited country, and for a similar reason, the laws of republics are generally better, and they improve much more rapidly than those of strict monarchical or oligarchical governments. It is the peculiar advantage of these latter that there is less of the *evil*,—there is less strife. The dread from above quashes contention, or, as it is commonly expressed in modern politics, maintains ORDER;† but for that same reason, the whole

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* This king invaded Scotland, and was defeated at the Largs in the year 1263.

† But under governments of this description, a MULTITUDE of DISORDERS is often supposed to constitute the elements of harmony and order, as precedent, and the repetition of the same anomaly in different places, is the principal basis and vindication of their enactments. In this instance, the difference is most in favour of republics. In monarchical or oligarchical states, error has a tendency to become a PRECEDENT; in the republic, it generally becomes a WARNING; this is the natural

physiology and pathology of the body politic remains undiscovered, or is, at best, imperfectly known. These propositions are confirmed by every part of history, and very strikingly by the history of Iceland when put in parallel with that of Norway.

The first settlers in Iceland were those of the aristocracy of Norway, who were most independent. The emigration from the latter country, was the consequence of the greatest political revolution known in the history of Norway. Divided, if indeed we can call that *divided* which never had been joined, into petty kingdoms and independent seigneuries, Norway was not one country, but a cluster of many countries, till the time of HARALD FAIRHAIR, whose father HALFDAN had been a ruler of one of the largest of these petty kingdoms. Harald's ambition, roused by the gibes of a Norwegian princess, to whom he had made proposals of marriage, suggested to him the bold idea of uniting by conquest, all the small kingdoms above mentioned under one sceptre, and of making himself as independent a "sovereign of Norway as king Erik was of Sweden, Gorm the Old of Denmark, or Athelstane of England." But what latter ages

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result of public and free discussion. A philosopher of old said, "that he preferred to *lie* (ψευδεσθαι) along with Plato, to the telling truth with another philosopher;" and similarly, some modern politicians might be conceived to prefer blundering with La Fayette and a republic, to the doing what was right in the system of Prince Metternich, Nesselrode, & Co.

have extolled as a most laudable political enterprise, could be viewed by the princes of Norway in no other light than that of tyranny and oppression. He was the common, the universal enemy; they therefore formed a league, and met him in the field, and on the high seas, with their united forces. But they being many, and he one, there was more unity in his councils than in theirs, and his plans were executed with greater promptitude. He fought the Norwegian princes in many battles, and was always victorious. The most decisive of these engagements, was the naval battle of HAFURSFIORD,* where Harald totally routed his opponents; after that battle, no resistance of any consequence was attempted,—the league was broken,—Harald saw his wishes accomplished—he was sovereign of Norway.

But though defeated, the Norwegian princes were not prepared to submit; they could not forget they had been Harald's equals in power, dignity, and descent; like him they had been sovereigns, and they could, as little as the Trojan princess, reconcile their mind to the idea of being subjects.† Like him, they were the progeny of the gods, and pride was glad to discover that it would be a kind of *impiety*,—a debasement of their divine nature,—to submit to the yoke. Accordingly, many preferred death to submission; it was a consolation to them *to be slain in their own domains*, where they con-

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* Circa 850.

† Δούλη κικλῆσθαι Βασιλὶς ὀυσ' ἀισχύνομαι.

ceived their persons to be peculiarly sacred, and where death appeared less bitter than in any other place.* The least energetic, or those who, entertaining less lofty conceptions about their own dignity, felt less degradation in humbling themselves, paid homage to Harald; but the most vigorous, with whom it was a paramount consideration to perpetuate their ancient race and their history, went in quest of other countries where they might preserve their independence, and where, if they did not hope to regain a power equal to that they formerly had enjoyed, they expected, in time, to forget their misfortunes, and feel less humbled

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* "*At falla á eignum sínum*," to fall in one's own domains. This favourite phrase of the Northern princes, so frequently occurring in the SAGAS, expresses a darling idea constantly present to their minds. A prince or a chief, who was killed on his own estates, was called *holy* (HEILAGR); if he fell elsewhere, he was *unholy* (UHEILAGR). Even after the introduction of Christianity, this phraseology was retained; nay more, *Snorri Sturluson*, a man of high rank, and of course a good Catholic Christian, insinuates of St. Olave, whom the church had canonized, that his only title to sanctity or holiness was, that he was slain by his own subjects in his own kingdom, and that otherwise, he was, in most respects, like his nephew *Harald the Severe*, who was killed in battle near York, of whom Snorri says, he could not be called holy, because he fell while in the act of invading a foreign kingdom. In other respects, it appears that the historian thinks him rather the better man, and the better king of the two. Indeed, as he was a man of eminent talents and acquirements, if he had been successful in his scheme of conquering England, he would have procured to himself more than one opportunity to purchase the title of a saint.

when so far removed from the scene of their defeat.

Thus Iceland was occupied by the flower of the Norwegian aristocracy in a manner to which history has no parallel: the many peculiarities in the institutions and the history of Iceland, can only be explained from the uncommon quality of the settlers. Of all other countries, the first inhabitants were mixed; and in modern times, great colonies have been founded by men whom their successors would be glad if history would entirely forget, and whom, even an antiquity of two thousand years will not be sufficient to ennoble or to canonize; but the settlers of Iceland were all select. Coming from a country superior to her neighbours in those accomplishments and arts which the age admired, they were the choicest men of that country, and left but few of their equals behind them. Only ignorance or affectation therefore can wonder, that the poetry of Iceland is richer and more cultivated than that of other nations during the middle ages—or that the Icelanders were more intrepid navigators—or that they were received and honoured as distinguished guests at the many foreign courts they visited—or that in Constantinople they were captains in the *foreign guard**—or that their historical works excel any thing the middle ages produced—or that even their laws are far superior to those of neighbouring nations. The soil of *Ultima Thule*, in-

* Βαρίαγγοι.

deed, is unconnected with these prerogatives; but her early inhabitants, being men of uncommon endowments and accomplishments, wrote histories because their words and deeds were worthy of record; they delighted in poetry, because their language, feelings, passions, were at once powerful and refined; and they composed good laws, because much self-feeling, and even ambition, early turned their attention to the principles of justice.

The high state of civilization in Iceland is then neither a miracle, nor, as some small-witted men have asserted, the result of long nights and *ennui*,*

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* This *theory* being so exquisitely foolish, that IT indeed may be the result of the winter solstice cogitations of some melancholy Don Armado, would be undeserving of notice, if it were not still repeated by some unreflecting authors. What? commencing our survey, either at the columns of Hercules, or at the colossus of Rhodes, do we find the state of poetry and history improving as we proceed northward? Have the French more eminent poets than the Italians or Spaniards? Is Russia or Lapland the peculiar home of polite literature? In what a poetic extacy Captain Parry must have been under lat. 83°! (I have not, however, forgot the arctic theatre of Melville Island). But unfortunately he was not there in the month of December, and accordingly had not the full benefit of a Polar winter night inspiration. What Sonnets, Madrigals, Odes, Epics, he would have made had he been there at that genial time of the year, when the sun could not be descried from the mast-head at noon! The truth seems to be this: the theory of *frost, darkness, long winter nights*, and *ennui*, was invented by a man who commenced studying Icelandic, found it no doubt very *ennuyeux*, as he would have found Arabic or Sanscrit; and, concluding from his own state of mind to that of the authors he wished to

but the same causes which have favoured and promoted civilization every where, were efficient, even in Iceland.

As it is of importance, with reference to my main subject, that the superiority of the Icelandic laws be fully understood, and as I am aware that much prejudice exists concerning this matter, it would not even be sufficient to shew the excellence of the Icelandic laws *de facto*, by pointing to the codes. When men are prejudiced, they are apt to forget that "*quod factum est fiere potest*," and thus one is called upon to prove, not only that a fact was thus or thus, but also, that it could not have been otherwise. What have we for our pains, after displaying the political wisdom of Northern laws in general, by stating the plain facts? Why, we are still asked, "how could this be?" and, most strange of all, this question is most frequently repeated in countries whose aristocracy still continues to boast their Norman descent.

In all the dissertations that have been written, "*Sur l'Inegalité parmi les hommes*," the inequality of races or nations, though far more striking,

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study, (for it is frequent that our objects receive the hue and colour of our own mind,) he wisely concluded that the literature of the North was altogether produced by *ennui*. Things appear yellow to jaundiced men. Otherwise:—there has been much excellent poetry and history written in Great Britain; but although *ennui* is by no means unknown in these Islands, yet the best poetry has not been written by those who felt it most, nor would those poets who suffered from it, ascribe their best effusions to that cause.

has generally been much less considered than the inequality of particular families, or even individuals; if a larger view had been taken, the result would at least have differed from Rousseau's. If, for example, such authors had turned their attention to the history of the Normans, they could hardly have failed to observe their very striking superiority over the other European races.

European civilization—of course American too—as it now is, in all its endless variety of modes and forms, is sprung from two sources; the one being Greek, the other Scandinavian-Gothic; these are the main sources. Each of these two streams divided very early, and near their original source; and thus we have, besides Greek, Roman culture in the south, and also Teutonic culture, besides the Normanic in the north of Europe. But as to early Teutonic culture, its monuments are not many, and the originality and antiquity of the few that exist, are questionable. Of the different elements here mentioned, the Normanic is by far the most prominent and conspicuous in European culture as it now is; for of Greek, very little remains, except a little school terminology, and the framework of some transcendental sciences which they had brought to perfection; add to this, a little, a very little of their taste in poetry and the fine arts which is still observable in the compositions of some European nations;—somewhat more is preserved of the Roman element. The roots of the Latin language are still preserved in the speech of many European nations, and their laws have spread to

nearly as great an extent as the *roots* of their language.* But of the Scandinavian, the Normanic element, the impress is obvious every where; the Romanch languages, the languages of Latin roots, have all received a Gothic system of inflexions, and Gothic laws of construction. The poetry of the nations who speak these languages, has entirely abandoned their ancient models, and become Gothic in form, matter, and spirit. This metamorphosis took place so speedily in Italy and Spain, and so soon after the Gothic invasion, that it is impossible to mistake the cause. The rhyme, as well as several Italian and Spanish metres, are Gothic, so are also the incidents and the imagery in their narrative poetry. As there is an identity in form and spirit in all Greek and Latin poets, in spite of their great variety of talent, taste, temper, and genius; so there is an equally marked identity as to form, matter, and spirit in all Gothic poetry, and the entire poetic literature of Europe since the tenth century belongs to this class.†

This Gothic ruling principle,—this *something identical* in the literature of Europe, can be fully

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* When we consider the influence of their language, the whole of Germany must be admitted to be exempt from that influence; and when their laws are considered, the British Isles may almost be exempted, being nearly free from any tincture of them. The admixture of Roman laws in the laws of Scotland is of comparatively modern date.

† Excepting, of course, the attempts which the learned have made in the classic languages, at imitating the classic verse; aye, and Celtic poetry, *Si Diis placet.*

appreciated and understood only by those who know the original,—the parent tongue of the Gothic nations,—the Icelandic; but it ought, at least, to have been divined by those who have taken a comprehensive view of the history of Europe, and studied it with an unbiassed mind. If it is difficult to name a country in Europe that has been exempt from Gothic dominion,—if it shall appear, on investigation, that from the sixth till the eleventh century the Gothic tribes made their appearance everywhere in this quarter of the globe, and everywhere as conquerors,—if we find, that wherever they came, they exclusively formed the first class of society,*—and when we consider that such a superiority is untenable for any length of time, unless it be mainly founded on intellectual prerogatives, we ought to cease to wonder, that the Gothic principle is still recognizable as an essential characteristic of modern European culture.

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* It is interesting to observe, how certain modern theories respecting aristocracy are contradicted by a certain unexpressed feeling,—a certain unpronounced conviction in the minds of their authors and propugnators. Thus, for example, those who affect to consider birth as nothing, chuse to attack the nobility on the score of birth,—a matter which these writers, to be consistent, ought to hold entirely indifferent. No man has yet been found so absurd (except perhaps Rousseau,) as to maintain, that a descent from a Norman noble of the time of the conquest, if sufficiently proved, were insignificant or of no avail.—No, no, it is considered far more effectual to attack the pedigrees, than to maintain such an absurdity. Lord Brougham has not scorned to be ennobled under a *Norman* name. It is a subject deserving of investigation, whether there is any other *real* birth-nobility in Europe than the NORMAN.

But the Gothic culture, like every other, had a fountain-head. During the tenth century, the source was in Norway, and the usurpation of *Harald Fairhair* produced this good, that by driving the chiefs and nobles into exile, it propagated Norman culture still further and wider over Europe. The principal men, indeed, went to Iceland, but Rolf the Walker, (Gaungu Hrolfr,) also driven from Norway, by a cause, indeed, somewhat different from that which compelled the former to seek an asylum in that remote island, became the founder of a ducal dynasty in France. Another Norwegian noble, Ketill Flatnefr (Flatnose,) founded a short-lived dynasty on the northernmost promontory of Great Britain ; little, indeed, is known of the ulterior fate of that dynasty, but judging from known effects,—from effects still subsisting and observable in the nineteenth century,—the dynasty which Ketill Flatnefr founded in Caithness, and which he extended over the Orkneys and the Western Isles, must have been penetratingly influential, since many vestiges of the old Norse language are still to be recognized in local names of these northern regions, and in the vulgar dialect of the inhabitants. The fact, that the Scandinavian Normen, wherever they emigrated, always appear as leaders, conquerors, and founders of dynasties, has been too little attended to by modern historians. If we contrast them, in this respect, with emigrants of modern nations, even the most civilized, the difference will appear very striking indeed. The history of the 18th and 19th centuries will record great emigrations of Frenchmen,

Spaniards, Italians, Portugueze, but NO CONQUESTS. What inference can be drawn from so plain a fact, but that the Normen were exceedingly superior in civilization, as well as warlike accomplishments, to cotemporary nations? *To make conquests in exile* sounds like a miracle, or almost like an absurdity in our age, and yet it is an every day fact in the history of our ancestors.

It is to be lamented, that through ignorance of the ancient Norse language, and the consequent inaccessibleness of true records, and the confinement of modern historians to the very partial chronicles of timid monks, as their only sources of information for the middle ages, history has been so thoroughly falsified, that it will now require the labour of learned and enlightened men for some centuries to come, to clear away prejudices too long established, and to reconquer for the Scandinavians that lofty place which they ought to occupy in the annals of the world. There is no remedy against this chronic disease with which history has been afflicted, but an attentive study of the Icelandic, and a thorough perusal of ancient Northern literature, the vast extent of which is even unknown among the leading nations of modern Europe. But I must, however reluctantly, leave this subject at present. This only I must recapitulate, which is relevant to my subject, that Iceland received its first inhabitants* from Norway, at a time when

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* I do not here notice the Irish settlers, which, according to ARI FRODI (the learned), had occupied Iceland before it

that country, in respect of culture, held a prominent place among her neighbours, that those who settled in Iceland, were the most distinguished men in the former country,—the flower of that stock of which less illustrious branches, emigrating to different parts of the world, became conquerors and rulers of the nations whom they visited, and, indeed, the patriarchs of modern European culture. Only thus prepared, we can rightly estimate Icelandic history, poetry, and forensic institutions.

" Quid dignum tanto feret hic promissor hiatu?" Were I only to put into the reader's hands those few works of Icelandic literature which have been published by the Arna-magnæan Commission of Copenhagen; and among these, the oldest Icelandic code, the GREY GOOSE, probably he would find the *hiatus* amply justified.

And yet what apparent falling off, if we commence the survey of the Icelandic form of process in early times, after the manner of Arnesen! " As " the oldest Laws," says this author, speaking of Iceland, " were very concise and simple, so, indeed, " the ancient process was very simple and limited. " *As long as the republic of Iceland was not com-* " *pletely organized*, the people were content to " submit all causes to the decision of the wisest " and most eminent men, within, or without the

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was discovered by the Norwegians. That Irish colony was either extinct, or had left the Island shortly before the arrival of the Norwegians. What ARI has said about it, is to be found in the beginning of the *Landnáma*.

" district where they resided, but this process had " no definite form.

" The Judge was not chosen by any general " agreement; but it only depended on both, or " even one of the parties, to choose whomsoever " they pleased, and to whom they were willing to " concede the honour of being their superior, dur- " ing a certain time, as there was no permanently " constituted magistrate."

All this is true, *i.e.* examples can be found in support of this theory, and yet it might lead to erroneous inferences; more aptly the commencement of judicial institutions in Iceland might be thus represented.

The first settlers of Iceland, being Norwegian Magnates, exercised, among their own followers and dependants, the same judicial authority which they had maintained in Norway, and which was vested in them as chiefs; but when differences arose among the chiefs themselves, they had to choose umpires for each cause that occurred, until the settlers had become so numerous, that it was rendered expedient to establish courts or *Things* similar to those which were usual in Norway for deciding causes. We find, even, that some of the wealthy settlers instituted regular courts immediately after their arrival. An instance of this kind we find in the *Eyrbiggia Saga*, where *Thórólfr Mostrar-Skegg* established a THING in form, and with all due ceremonies, on the sacred promontory of Thorsnes. This THING was situate in the immediate vicinity of a temple of THOR, which Thorólf also founded, constituting himself both a

high priest of the temple, and also a supreme magistrate or *Hegemon* of the Thing. A detailed description of this Thing in the Saga, quoted above, shews, that it was by no means deficient in *formalities*, but, on the contrary, was rather encumbered with their multiplicity. Many other Norwegian nobles and chieftains, who settled in different parts of Iceland, exercised the same jurisdiction as *Thorólf* among their dependants, and they seem to have instituted similar THINGS. From the quality of the settlers, and their long established—their hereditary authority among their followers, (of which they certainly lost nothing by emigration), it is a natural consequence, that judiciary institutions were never in a state of perfect infancy in Iceland, but were developed to a certain maturity in the very commencement. In short, they were as complete under the new settlers in Iceland, as they had been under the same persons, while residing in Norway, invested with authority as independent chiefs. But at first, these judiciary institutions had no common centre ; and, during the first *fifty-four* years after the first settlement, there was no court of appeal in the Island.

The ALTHING (Universal Thing), which may be termed the *Parliament* of Iceland, was founded in the year 928. The Althing was both a legislative assembly, and also a supreme court of judicature, to which an appeal lay from all the District Things (*Repps* or Herads Thing), and Provincial Things in the country. Many hundred passages might be quoted from the Sagas, to shew the intricacy of the

form of process before this supreme court, and which clearly demonstrate, that though the court was new, the form of process was very ancient.

ANNOTATION.

I will quote only one short passage of an intricate case of divorce from the *Niáls Saga*, in which the chieftain GUNNAR of HLÍDARENDA was the prosecutor, in behalf of his relative UNNUR, the wife of *Rút*, who, *propter mariti impotentiam*, sued for divorce, and the restitution of her dowry:

" Gunnar pleaded the cause, and, at last, he invited the " defendant (*Rút*) to put in his plea: Rútr called wit- " nesses, and said, that Gunnar must be non-suited, as he had " omitted to bring into court the evidence of three kinds of " witnesses. The first kind were those which were called at " the bed-post, (where Rut first was summoned); the second, " those called at the *Male-door* of his house (there being " different doors for males and females in the houses of the " Icelandic chieftains;) the third, those called at the LAW- " CLIFF." (The court on the Althing was held on a rock betwixt two chasms or ravines). " Niáll had then arrived in " the court, and said he knew a remedy in the case, and if they " would try, he would shew them that the suit was not lost." But GUNNAR being better swordsman than lawyer, shortened the process, by offering trial by battle, which was also sanctioned by the laws as they then stood.

One or two instances more, it is hoped, will not be unacceptable to the English practising lawyer, as they will shew, that the process in Iceland lacked not intricacy and technicality.

" *Asgrim Ellidagrimson*, (an eminent Jurisconsult) had a " law-suit on the Althing against Ulf Uggason. There hap- " pened to Asgrim a thing which rarely occurred in any cause " in which he was concerned; he was non-suited for mistaking " a point of law: he had nominated *five* Jurors, where he " should have nominated *nine*. This was actually pleaded in " defence." *Odd Ofeigson*, on another occasion, committed

the following error: "Odd prepared the cause for the Al-
"thing, and summoned nine Jurors out of the district; but
"now, it so happened, that one of the Jurors died, and Odd
"instantly summoned another." Against this, an objection was made by two lawyers, Styrmir and Thorarin, who observed: "We do both of us perceive, that Odd has here
"mistaken a point of law in the preliminaries of this cause,
"summoning a Juror *out of the district* instead of the deceased,
"for this he ought to have done *on the* THING; he must ac-
"cordingly be non-suited." One of them instantly went up to the court, and spoke as follows: "Here are men ready to
"defend *Ospak* (the defendant) in this cause. Thou hast
"made a mistake in the preliminaries, and thou must be non-
"suited; thou hast to choose one of two things, either
"drop the matter entirely, and proceed no further, or we will
"put in our plea, and avail ourselves of the circumstance,
"that we are a little more versed in the law than thou art.
"They, at the same time, stated to him wherein the error
"lay. Odd was astonished, and greatly vexed, and left the
"court."

Odd's father, *Ofeig*, was a lawyer of a less formal school; he spoke as follows: "How does it happen, that Ospak is not
"outlawed? Are there not sufficient grounds to condemn
"him? Has he not, in the first place, committed theft, and
"then slain *Vali?*" To this the court answered: "All this is
"not denied; nor is it pretended that this issue of the cause
"is grounded in justice or equity; but there was an informa-
"lity in the preliminaries of the process." Ofeig replied,
"What informality could there be of greater moment than the
"crimes which this man has committed? Have you not
"made an oath, 'that you will, in your judgments, adhere to
"justice and truth, and the laws?' But what can be more
"just and equitable, than outlawing and depriving of all
"means of supporting life a most heinous culprit, who has
"deserved such a condemnation? As to that part of your
"oath, by which you are enjoined to judge *according to law*,
"you ought, indeed, on the one side, to be mindful of the
"laws of process; but, on the other, not forgetful of equity
"and justice: this ought to be your firm purpose when you

" take the oath, to condemn such as have deserved it, to " punishment, and not to incur the heavy responsibility of " suffering them to escape with impunity." " Of which " speech, the meaning undoubtedly is," says Arnesen, " that " error committed by the plaintiff in the preliminaries of the " process, ought not to exempt a criminal from well deserved " punishment."

Intricacy in the law of process has sometimes been considered as a matter of boast by the lawyers of a certain great nation. The laws of the republic of Iceland in the tenth century, may contend for the palm, if intricacy deserves one, with the laws of any other nation. An interesting fact of this kind is recorded in the Niáls Saga. MÖRDR had lost a lawsuit against RUT; but Gunnar of Hlidarenda being a better champion than lawyer, wished to bring a new action against RUT, and consulted his friend NIAL, an eminent lawyer, about how he was to proeeed. Niál knew that RUT was a great *Jurisconsult*, and thought it would be most satisfactory and secnre, to obtain from Rut all the information he possessed; and for this purpose, he devised the following scheme: Gunnar was to disguise himself, and pay a visit to Rút. Rút would, according to custom, enter into conversation with his guest, and ask hiu many questions relative to that part of the country from which Gunnar came. During this conversation, it was anticipated that Gunnar would find an opportunity to compliment Rút for his address and law-learning displayed in his defence against Mörd. It was also supposed, that Rút would deride the ignorance of the adverse party whom he had defeated on the Althing. Thus Niál, with surprising sagacity, anticipates a conversation of some length between Rút and Gunnar, of which the following is a part:

" Then *Rútr* will reply, 'Do you not think he (Mördr) made " an awkward figure, bringing an action, and yet not being able " to recover the money?' 'I can give thee a good reason for " that, shalt thou say, 'thou didst challenge him to fight a duel, " and he was an old man, and his friends dissuaded him from " fighting against thee, and proceeded no further in the cause.' " 'Indeed, I did as you say,' will be Rút's reply, 'and foolish " men thought the law was on my side; but he might have

" brought a new action on the next THING, if he had had " energy to do it.' "

Gunnar succeeded completely in executing this stratagem, and even learned from Rút the very formula of the summons; he repeated the summons as it were in joke, and then asked Rút if all was now right; and Rút having declared that it was, Gunnar threw off the disguise, and summoned him instantly.

§ 31.

During the four first centuries of the history of Iceland, when the constitution and government of the Island was republican, it was divided into thirty-nine *shires* or prefectures, in Iceland called GODORD: the prefect or magistrate of each shire was called GODI, and the term *Godord* denotes both his dignity, and also the district over which his authority and jurisdiction extended, *i. e.* both the *Godi-ship* and the *Godi-ric, sit venia verbis.* *Godi* is derived from GOD, a word which, in Icelandic, bears the same signification as in English, or Anglo-Saxon; thus the term Godi is somewhat analogous in its formation to the Hindoo *Brahman*, or *Brahmin*, from *Bramah.* Before the introduction of the Christian religion, the Icelandic *Godi* joined a spiritual to a temporal dignity, deriving his appellation from the former; he was a high priest of a principal temple, and even after the abolition of that office, along with that of the ancient religion in the year 1000, the *Godar* (the plural number of Godi) retained their title, although it then only denoted secular magistracy or

chieftainship; those of the GODAR, however, who built churches instead of heathen temples on their estates, acquired thereby church patronage, and the right of choosing their own clergymen, whom they generally took care to have educated and instructed at their own expense. *Godord* literally translated, means a *Godi's word*, *i. e.* a district in which such a magistrate's *word* was obeyed,—where he had juris*diction*.

Three *Godords* made a THING, *i. e.* a juridical district in which the *Varthing* (the vernal courts or assizes) were annually held. There were *thirteen* such districts in the Island. These *Varthings* were held sometimes in the earlier half of the second summer-month, according to the Icelandic calendar, or by the Roman calendar in the latter half of the month of May, or in the first days of June. The three *Godar* nominated for these Varthings *twelve judges*, who adjudged causes in *first resort*, *(prima instantia.)*

From these vernal *district things*, an appeal lay to the *Fiórdúngs dómar*, which were held about midsummer on the ALTHING, and which, in a certain sense, may, in English, be termed *quarter sessions*, because here causes were adjudged in *second resort* from each of the *four quarters* of Iceland. In each quarter, except the northern, there were *nine Godar*, and each of them nominated his man to be a judge in the *Fiórdúngsdóm*, or quarter session. In the northern quarter, the *Godords* were indeed *twelve*, but the law and the *Althing* recognized no more than *nine*, and ac-

cordingly the *Nordlendinga Dómr* had only nine judges like the rest.

Lastly, from the *Fiórdúngs dómar*, an appeal lay to the *Fimtardóm*, the *fifth court*, or tribunal, so called, because it was the fifth in number of the courts which were held on the *Althing*, for there were previously four. This last was a court of appeal for the whole country, where causes were adjudged in third and last resort; the judges or assessors of which it consisted, were nominated by the Godar, twelve from each quarter of the Island, so the whole number of *nominated judges* amounted to *forty-eight;* but the law *enjoined* (not merely permitted) the plaintiff to discard *six* of these, and the defendant other *six*, and thus the number of actual judges amounted only to the doubly sacred number of 36, or three times twelve. If the defendant refused to reject any, or that half dozen which the law ordered him to reject, the plaintiff had to do it for him. This formality was held so essential, that if it was not done, the cause was not adjudged at all; or if the judges actually gave judgment, being for example 42 in number, their sentence was not valid. The *Niála* records an instance of a cause being lost by this informality.

§ 32.

In all these different courts, both *Juries* and *Wagers of Law* were employed for judging of facts. It is in our power to unfold the doctrine

of Icelandic Juries with greater accuracy than that of other Scandinavian nations, because the rules respecting trial by Jury are laid down in the *Grey Goose* much more minutely than in any other code whatever, and probably it was in Iceland that this institution reached its highest perfection.

In the Icelandic Jury, I propose to consider *its number; the qualifications of Jurors; the time and place* for *their nomination;* and *the mode of their giving their verdict,* with the circumstances therewith connected.

First, As to the number: The Icelanders employed in some cases *five,* in some *nine,* and in others *twelve* Jurors.

The *Grey Goose,* and the *Ecclesiastical Law,* order *five* Jurors to be used in the following cases:

I. In all unlawful and iniquitous practices in the *manner* of conducting the process, such as evasions, law quibbling, or refusal of justice, of which the prosecutor, or the Jurors, or other persons concerned in the process, might be accused.

1. With reference to the essential proofs in the cause:

(*a*) As when a Juror was summoned because he ran away from his district, in order to escape from being impannelled as a Juror.

(*b*) When a person would not declare *cujus vice fungens,* or with whose full powers he had met on the ALTHING. This obstinacy concerned the manner of conducting the process, in as much as it depended on this person's declaration, whether

he would appear in court,—be a Juror or assessor instead of another person, or not, &c.

(*c*) When the prosecutor did not in due time bring his cause before the *Althings Courts*.

(*d*) To ascertain whether the absence of Jurors or witnesses from the *Althing* was occasioned by lawful causes or not.

2. For completing and supporting the prosecutor's proofs and evidence.

(*a*) As when only one of the summoned witnesses appeared in court, (for the law of Iceland demanded two as a minimum); in this case *five* Jurors were required to support the evidence of the one witness in order to render the evidence complete. Five Jurors were also taken instead of all the summoned witnesses in the case, for example, of all of them becoming mute, or none appearing.

(*b*) When the prosecutor's *Quadarvottar*, *i. e.* the witnesses he had for the nomination of the Jury, did not appear in court, he was at liberty to nominate *five* Jurors in their stead.

II. In several cases concerning *inheritance* and other property; as when the parentage of a child was doubtful, or when the question arose whose duty it was to maintain an Omagi, *i. e.* one who was either sick, aged, or under age.

(*a*) If an unmarried woman had a child, she required *five* Jurors to establish the child's parentage, because the law obliged the relations of such a child's father to maintain it, in case he was not

able to do so, or if he perhaps were dead; but the mere *dictum* of the woman was not recognized by the law as sufficiently valid for laying such a charge on them; therefore the truth of her averment must be investigated by a Jury.

(*b*) When the question was, who was the next heir to an OMAGI; and whether he had sufficient property to maintain him.

(*c*) When a person was accused of having retained the property of his *ward*, and of not allowing it to be valued.

(*d*) When an action was brought against the guardian of an Omagi, to recover payment for the maintenance of the latter during a certain time.

(*e*) When the heirs of a *wanderer* who was nowhere domiciled claimed his succession.

(*f*) When a *dead man* was summoned, (for this was sometimes done), because a woman had declared him father to her child, born after his decease.

III. In certain police causes.

(*a*) If a man was accused of gambling: If a man dressed like a woman, or a woman like a man, with the intent of falsifying their sex.

(*b*) If litigation arose concerning the division of a whale, or how much of it belonged to the man who first fixed his harpoon in it.

IV. When a man was accused of attacking another in private, and in the absence of witnesses, with opprobrious language, or of libelling or lam-

pooning him. And finally, all three marks causes respecting trespasses on wood, ploughland, or meadow, and in short, all causes of small fines, were tried by five Jurors.

The Ecclesiastical courts employed five Jurors,

1. When a person was accused of refusing his assistance, it having been required, in bringing a child to church for baptism; and if the priest was accused of refusing to baptize.
2. When a person was accused of giving away money which had been bequeathed to the church, or destined for other pious uses, or of paying debts unconnected with the church with the same.

The secular courts used NINE JURORS, amongst others, in the following causes:

I. In cases concerning the preliminaries, or the order and manner of conducting the process.

(*a*) If the defendant was on the *Althing* accused of unwarrantably setting aside the proofs of the cause against him, of starting groundless objections, or in any other way hindering final judgment to be given.

(*b*) If the judges were accused of refusing to declare the final sentence.

(*c*) If a freeholder was accused of absence from the vernal assizes, during one night, or a longer time.

In these cases, nine Jurors, *de vicineto, i.e.* either of his own nearest neighbours, or of the nearest neighbours to the place where the THING was

held, had to investigate the cause of his absence, and to judge of it.

(*d*) If a person prevented a Judge from taking his seat in the Court.

(*e*) If a person prevented the inhabitants of a district from holding district meetings (REPPADÓM), where matters relative to the maintenance of the poor, and other topics of political œconomy, were to be discussed.

(*f*) If an outlaw had the hardihood to make his appearance on a THING.

II. In *matrimonial causes.*

(*a*) If two persons married who had not sufficient means to support themselves.

(*b*) If a person unlawfully prevented another from marrying, by holding his betrothed bride under restraint, or confinement.

(*c*) If a man was accused of BIGAMY.

(*d*) If a woman unlawfully separated from her husband, and married another.

(*e*) And, finally, nine Jurors were employed in all matrimonial causes, which subjected the guilty party to the punishment of the lower grade of *outlawry.*

III. In cases of homicide, or hostile attack by wounds, blows, knocking down, ambush, conspiracy, &c.

(*a*) If a person who had slain another was summoned for not covering the body of the slain, in

order to protect it against wild beasts and birds of prey.

(*b*) If a person MURDERED another: the term *murder* (MYRDA), in ancient Icelandic Law, signifies to slay, without publicly avowing or proclaiming the manslaughter.

(*c*) If a person waylaid another with intent to kill him.

The prosecutor was bound with certain formalities and ceremonies, to request such Jurors as were nominated in cases of manslaughter, to go to the Althing, unless they of their own accord promised that they would go and give their verdict in the cause.

(*d*) When a GODI, or his agent, neglected to hold *execution* * at the residence of a person who had been outlawed.

IV. In several causes relative to *inheritance* and *property*, particularly when a person unlawfully retained the property of *minors*, and also,

(*a*) When a person summoned an heir, inviting him to take possession of his inheritance.

(*b*) When an heir, who had become of age, summoned his guardian to pay the inheritance; likewise when it was contested how much the guardian had received in trust.

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* It is in the law of Iceland called *Execution Court* (FÈRÁNSDÓMR). The proceedings in this court were extremely severe, and even cruel. The most detailed account of it is to be found in the *Saga* of *Rafnkel Freysgodi*.

(*c*) If it was contested whether an heir had sense enough to administer his own affairs.

V. In *Infamous Causes.*

(*a*) In cases of theft, witchcraft, false weights and measures, &c.

(*b*) If a person retained and concealed fines which had been paid.

VI. In cases concerning Police, and Public Economy.

(*a*) If a person had violently taken away another's property, injured or driven away his cattle, or unlawfully used his pasture land.

(*b*) If persons not lacking strength to work, wandered about begging.

(*c*) If a sick or aged person died, having been brought to one who neither was bound nor willing to maintain him.

(*d*) If a person sold his own relations as slaves out of the country, either for gain, or to pay his debts.

(*e*) If a person refused to pay the rent of cattle, of which he had had the *usus fructus.*

(*f*) If a person hid money or treasure in the earth.

In general, it may be observed, that *nine Jurors* were employed in cases punishable with the lower grade of outlawry, and in some cases punishable with the higher grade. *(Fiörbaugs oc Skóg-gángs-sakir),* especially when these concerned limits of land or pasturage.

The Ecclesiastical Courts employed *nine* Jurors in almost all cases punishable with the lower grade of outlawry *(Fiörbaugs sakir)*. To this class belong the following causes:

(*a*) When a householder refused a night's lodging, or shelter, during ill weather, to people bringing a child to baptism.

(*b*) If a person refused to lend a horse to another, who had to bring a dead body to the churchyard for interment.

(*c*) If a householder refused a night's quarter to a traveller.

§ 33.

The greatest number of JURORS recognized by the law of Iceland is TWELVE: as this was the greatest number, so their nomination was accompanied with more ceremony than that of the preceding. This institution, called in Icelandic *Tólftar quidr* (a nomination of twelve), is quite as ancient as the Juries of five and nine before mentioned, for it was in use long before the introduction of Christianity (*i. e.* before the year 1000), and while the laws of *Ulfliót* were in force.* The Jury of twelve was much employed in cases of difference between the *Godas* and their *Thingmen*. The *Godi* being either defendant or prosecutor, had the right

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* Of these twelve Jurors, the eleven were always nominated by the *Godi*, himself being the *twelfth* in ordinary cases, *i. e.* when he was not a party.

of nominating the eleven Jurors; he was not, however, to be the twelfth himself in either case; but as there were always three Godas in each THING, the prosecutor nominated one of his (the Godi's) colleagues, if that colleague was not, by relationship, or other causes, incapacitated; if he was, it seems that the number was not completed, * and that the verdict of the MAJORITY of the eleven was valid. For the *majority's* verdict was received in every case: only when there was a Godi among the Jurors, and if they then divided equally (six on each side), then the verdict of those who joined the *Godi* prevailed.

These Jurors were subject to the same inquiry as to their qualifications as Judges. In order to obtain them of the *Godi*, the prosecutor applied to him in his tent [on the Althing]; if the Godi was not within, the prosecutor still pronounced, before the place where he used to sit, his request that the Godi would nominate the Jurors. Yet before the prosecutor could thus apply, he was bound previously to ask the Godi, in open court on the Althing, whether there were present so many of his Thingmen that he could from them complete a Jury of twelve, after nominating his complement of Judges for the *Quarter Sessions*, † and the supreme court of the *Fimtardóm*.

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* Certainly not in the case when the *Godi* was the prosecutor.

† This word is here understood in the Icelandic sense.—See above.

The causes in which twelve Jurors were required, were :—

I. Concerning the preliminaries, as, False proof and evidence at the vernal assizes, perjury, &c.

II. Certain aggravated cases of manslaughter and murder ; sheltering and protecting an outlaw ; gross libel, &c.

III. Certain cases of greater importance concerning the maintenance of the poor, police, and public economy ; and finally,

IV. All the gravest and most momentous causes of every description.

§ 34.

The qualifications of Icelandic Jurors have reference to their *person*, their *status* in society, *localities*, or to *the cause*.

Among personal qualifications, are chiefly to be considered :

1. The *Age*. The *age* of *witnesses* is determined in the Icelandic law ; none could be summoned as a witness who was less than twelve years of age. Arnesen, as it seems, wishes it to be inferred, that the rule respecting Jurors was the same, for he found no specific rule either in the codes of law or in the sagas ; but from other qualifications of Jurors which will be mentioned hereafter, it is more natural to conclude, that a Juryman must have been about twenty years of age at least.

2. *Relationship* and *Affinity*. There could not

be nominated as Jurors, such as were brothers or cousins, or even nearer related to the parties in the cause; but how near soever they were related to one who carried on the process as agent, or with full powers from one of the parties, was not taken into any consideration. A father and his son were considered as one Juror, if they were on the same side; but if on different sides, they were held as good as any other, and each counted for a complete Juror, because it was then evident that they were not influenced by family considerations. The same was the case with two brothers, and other near relations.

3. *Sickness* and *Infirmity*. None could be nominated as Juror for the Althing, who was not so well that he might, without any injury to himself, perform the legitimate *Althing journeys, i. e.* twenty miles a-day, or a *Thingmannaleid*, (the Icelandic pharsang is so called). His nomination was unlawful, and his verdict of no avail, if he was thus unwell when nominated, even though he might afterwards recover, and be able to attend the Althing. He was also incapacitated to serve as a Juror, if his eyesight was so weak that he could not find his way in a part of the country with which he was acquainted. In these cases, one of the following persons could be chosen in his stead: his own son, lawfully begotten; his son-in-law; his stepson and foster-son, when of lawful age; but a foster-son is he, whom a man takes into his house eight years of age, and educates till he is SIXTEEN. A woman could not serve as a Juror, but one of the afore-mentioned four persons, or also her husband,

had to serve in her stead. Besides these, *minors*, *lunatics*, *outlaws*, and such as were convicted of any *infamous crime*, were incapable of being Jurors.

As to the qualifications of Jurors in respect of their *status in society*, there is chiefly to be observed: That the rule was to summon only farm proprietors, who had so much substance that the law made it incumbent on them, at any rate, to pay the expense of an Althing journey; yet even labourers could be summoned to serve on a twelve men's jury. A householder could be summoned to serve in almost every cause, when a sufficient number of farm proprietors could not be had; but the householder, in order to be qualified, needed to possess forty shillings sterling, * free of debts, per head, of every person in his family.

The ground of this law seems to have been, not so much that wealth was considered an indication of respectability and independence, as the solicitude every where conspicuous in the Icelandic laws, to exempt the poorer classes as much as possible from all public burdens; the journey to the Althing being expensive in various ways.

The qualifications of Jurors as to locality. Such as had been on the spot where a *fact* had occurred, provided they themselves were in no manner connected with, or implicated in, that fact, were to be

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* The Grey Goose says, the value of two cows; but it is well known that the value of a cow at that time was L. 1 sterling.

nominated in preference to others. Also *nearest neighbours* were held to be eminently qualified; and if the prosecutor passed them by, and chose others remoter from the place where the deed had been committed, or from the residence of the defendant, the latter could challenge them on that account. This was termed "*at rydja at leidar leignd,*" *i. e.* propter itineris longinquitatem rejicere. There existed a regulation respecting the proper distance of a Juror's residence from the place of the fact; another limitation referred to the *forum*, or jurisdiction. Yet if the Juror could plead ignorance of these circumstances at the time when he nominated the Juror, that ignorance would sometimes render his nomination valid, although slightly deviating from the strict form.

The qualifications of Jurors respecting the cause. No party in a cause, nor a person in any way implicated in it, could be either a witness or Juror. If the nomination was in any way unlawful, his verdict was of no use, unless he represented another Juror who was unwell, or otherwise prevented from attending.

Under such circumstances, Jurors sometimes refused to declare their verdict; but in this case they were bound to state in court what causes prevented them from declaring it; as, for example, if the prosecutor had nominated five Jurors instead of nine, or nine instead of twelve; if the fact had occurred at sea, for example, midways between Norway and Iceland, or even in some place still more remote; if the law of the case was doubtful, &c. In these cases, as many of the Jurors as were in

any way affected or incapacitated by such lawful objections, were exempted from declaring their verdict; yet the prosecutor continued his prosecution, if only more than one half of the total number of Jurors were lawfully nominated, having only to pay a fine of three marks for each Juror who had been nominated contrary to law.

There likewise existed regulations respecting the nomination of Jurors with reference *to time*. In these regulations were considered the time when the fact took place; the time when the district courts, or assizes, and the *Althing*, were to be held, and the distance of the place from these; the nature of the cause itself, &c.

And again, as to the place of nomination. All Jurors were nominated either at home, in the district, or on the Althing. All these rules are minutely explained by Arnesen, in his "*Islandske Rettergang*," p. 210, et seqq.

§ 35.

Further Regulations respecting Icelandic Jurors, and their Vote or VERDICT.

The Jurors being nominated, the nomination, if it had taken place in their absence, was to be announced to them. This announcement laid them under a legal obligation of going to the *Althing*. If any of them fell sick during the time intermediate between the nomination and the *Althing*

journey, he had to call the nominators and the other Jurors before him, and having made an affidavit in their presence, to state exactly what he would have declared in court respecting the cause: two men (but not any of the other Jurors), received this declaration, and represented him in court. If two Jurors fell sick, three men represented them jointly. If a person was nominated when his luggage had been brought on board a vessel, and he was quite ready to go, he had only to offer to the nominator to declare his vote in the presence of the other Jurors; but he was not, like the sick man, bound to call them together; it was sufficient if he made his declaration in the presence of the nominators, along with other two men, who then had to represent him in the court. If a Juror fell sick on the *Althing*, he made his declaration on oath, on his sick bed, or in his tent, in the presence of two men sent from the court to receive it. If a Juror died while the process was pending, another must be nominated in his stead, who resided as near the place where the fact had occurred as he had done; but if a Juror neglected to make his appearance, any of the nearest neighbours were chosen in his stead.

If a Juror was nominated to serve in a cause in which he took no interest, or of which he did not even know the circumstances before it was time to depart for the Althing, he could repair to the nominator's residence, and demand of him a saddled horse fit for the journey, together with victuals, lodging on the *Thing*, and other things he might

require; and the nominator was bound to appoint to him the place where all these things were to be found; if this was refused, the Juror was not obliged to go to the *Althing;* but this privilege was only available to the poor and to common workmen. Most farm proprietors had some business on the Althing at any rate, and being there, they could not refuse to serve as Jurors when lawfully nominated.

An important part of the Icelandic law respecting Juries, is the investigation or scrutiny of their qualifications, called in the *Grey Goose* and the Sagas "RUDNING KUIDARINS." As soon as the cause was before the court, and the prosecutor, observing all due formalities, had opened it, he had to present his Jurors, and offer to the defendant to investigate whether they were qualified to give a verdict in that cause or not. If he omitted to make this offer, his suit was lost; but the Jurors were free from all blame. If the defendant delayed the investigation too long, then his cause was lost; yet he incurred no additional fine or punishment for his neglect. The prosecutor made his offer in a set speech, in which he had to mention the names of all the Jurors; then the defendant rose, called witnesses to the legal act he was about to perform, in examining the Jurors' qualifications, and stated his objections against them, if he had any, solemnly protesting against their *verdict* in that cause, and declaring it void. If the defendant had any Jurors of his own, the prosecutor possessed the same right of investigation. A majority of the Judges had to be present during the investigation,

and when it was finished, certain clerks or secretaries of the court proclaimed its termination and result.

As soon as the defendant had declared himself satisfied with the Jurors, they had to make an affidavit, and pronounce their *verdict.* IF THEY DID NOT ALL AGREE, THE VERDICT OF THE MAJORITY WAS HELD VALID. If the declaration of the Jurors completely agreed with the statement of the prosecutor, no doubt was entertained against their verdict; but if they either omitted something of what he had said, or added something, or materially altered any particular, they were considered as false. Yet they were not required to use exactly the same expressions as the prosecutor, provided the sense was the same. A lot decided who amongst them first should begin to declare the verdict. These verdicts were commonly of greater length than they are in Great Britain, for they contained a short recapitulation of the facts connected with the case; and it appears that each Juror pronounced his declaration and verdict separately, and yet in the presence of the whole court, and in the hearing of the other Jurors. In case of dissent, those who dissented were bound to declare an oath, "that they, by their dissent, did not intend to refuse justice to any person; but that they had made a statement which they considered right before God and their conscience, and which they would have maintained if the majority had been on their side;" they at the same time expressly mentioned what their verdict would have been in that case, and when they observed this formality, they were not considered as

false. If there was an equal number on each side (of course without any *Godi*), the verdict of those who best explained the circumstances of the case was received: if both parties did this equally well, those prevailed who agreed with the prosecutor.

A Juror who obstinately refused to declare his *verdict* was considered to give it on the side of the prosecutor.

If a *Godi* refused to pronounce his verdict in a twelve men's Jury, he was considered to cast the person who requested it, unless *five* of the *Godi's* neighbours would declare that he (the Godi) would certainly not have given his verdict against that person, if he had given it at all.

§ 36.

I have here, with Arnesen's excellent work before me, given an abstract of the Iceland law respecting Juries, as it is laid down in the *Grey Goose.* What is here said, shews only the state of the law during the time of the republic, *i. e.* down to the year 1263. The code of King Hacon * greatly altered this law; and the *Jónsbók*, the code of King Magnus, which succeeded to it in the year 1280, shews a manifest tendency to abolish the Jury altogether. There, too, the term employed

* This code was called *Járnsída* (Ironside). It was sent to Iceland about the year 1262 or 1263. It was extremely unpopular in the country for which it was given, and it is doubtful whether the courts ever followed it. It really is a miserable piece of legislation.

for Jury is novel and degrading, and analogous to that which occurs in the Gulathings law, promulgated by the same King.* The Jurors are in the Jónsbók termed *Heimiliskuidarvitni (i. e. witnesses* of nomination-men having a home or residence). But although this new code undoubtedly lowered the authority of the institution, it did not succeed in extinguishing it altogether. I apprehend, that down to the middle of the seventeenth century at least, trial by Jury was in use in the supreme court of the Althing, to a greater extent than might be inferred from Arnesen's representation of the matter. I have found in MS. *Althing Journals* from the year 1632, that cases of witchcraft were tried before this tribunal, by two dozen of mixed Jurors, of laymen and ecclesiastics. Arnesen was a provincial Judge of the eighteenth century, and his views of matters forensic were those of a modern Copenhagen lawyer. The ancient forms interested him merely as an antiquary; those which monarchical institutions and royal edicts had set aside, were by him never regretted; on the contrary, speedy and simplified forms of process he esteemed as very great improvements; nor did he at all lament that the responsibility of the Judge was in some respects greater under the modern, than it had been under the ancient constitution of the courts, or that he was now more than formerly liable to be fined, or deprived of office by the superior Judges, "*mortales enim onus nun-*

* See above, p. 64.

quam recusant, vel gravissimum, quod honos opes ampliorque dignitas consequuntur."

Feeling, as I do, the many defects of this treatise, I humbly conceive that the main problem has been solved. I was desired to furnish information concerning Trial by Jury in the ancient Scandinavian courts, particularly with regard to the verdict: *Whether it was required to be* UNANIMOUS, or whether *the verdict of the* MAJORITY *was received as valid and conclusive,* and *how far the* JUDGE *had any influence on the final verdict, when the Jurors disagreed?* As to the mere historical treatment of this question, I flatter myself that I have hardly been guilty of any essential omission; having examined about forty ancient codes of law, besides a vast number of other sources and authorities, I did not rashly arrive at any conclusion. But as to other topics connected with the history of Trial by Jury, which I proposed to elucidate, considering them to be of interest to the lawyer, the historian, and the antiquary, I only regret that I had not so much leisure at my command, as was necessary to execute my own plan in detail, with such harmony, uniformity, symmetry, and perspicuity as I desired. I have, however, pointed out those sources which ever will be the most available to every future inquirer.

FINIS.

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